United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued Oct. 22, 2002 Decided March 11, 2003

No. 01-7156

KISKA CONSTRUCTION CORPORATION, U.S.A., AND KAJIMA ENGINEERING AND CONSTRUCTION, INCORPORATED, A PARTNER IN KISKA-KAJIMA, A JOINT VENTURE, APPELLANTS,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, APPELLEE.

Appeal from the United States District Court
for the District of Columbia
(No. 97cv02677)

Kenneth W. Starr argued the cause for the appellants. *Christopher Landau* and *Grant M. Dixton* were on brief.

Kenneth B. Weckstein argued the cause for the appellee. *Phillip T. Staub* was on brief.

Before: GINSBURG, *Chief Judge*, HENDERSON, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge:* Appellee Washington Metropolitan Area Transit Authority ("WMATA")

contracted with Appellants KiSKA Construction Corporation-U.S.A. and Kajima Engineering and Construction, Inc. (collectively "KiSKA") in early 1994 to construct two subway tunnels in Washington, D.C. for a fixed price of $43 million. After experiencing various difficulties completing the project, KiSKA filed suit against WMATA in the United States District Court for the District of Columbia alleging counts of: (1) fraudulent misrepresentation; (2) negligent misrepresentation; (3) unilateral mistake; (4) material breach of contract; and (5) quantum meruit.

The district court dismissed KiSKA's two tort claims—fraudulent misrepresentation and negligent misrepresentation—for lack of subject matter jurisdiction, concluding that WMATA had not waived its sovereign immunity from liability for torts occurring in the performance of a governmental function. The district court then granted summary judgment to WMATA on KiSKA's quantum meruit claim. After a five-week trial on the remaining contract claims, the jury returned a verdict for WMATA on both counts. The district court subsequently entered final judgment in WMATA's favor on March 23, 2001 and denied KiSKA's motion for a new trial on August 20, 2001.

On appeal, KiSKA challenges three pre-trial rulings that the district court's August 20, 2001 opinion and order incorporated by reference. First, KiSKA argues that the district court erred in dismissing its tort claims on sovereign immunity grounds. Second, KiSKA argues that the district court misinterpreted the contract's dewatering provisions. Third, KiSKA argues that the district court likewise misinterpreted the contract's grout hole provisions. We find all three of KiSKA's challenges to be without merit and, accordingly, affirm the judgment of the district court.

I. Background

A. The 14th Street Tunnel Project

This litigation arises out of the extension of WMATA's Green Line subway train under 14th Street in Washington, D.C. Before soliciting bids for the tunnel project, WMATA retained an outside technical expert, GZA GeoEnvironmental, Inc. ("GZA"), to analyze the subsurface conditions in the project area and to study the feasibility of various tunneling methods, tunneling equipment and dewatering systems.[1] GZA submitted its first Tunnel Alternative Report ("TAR") in November 1992. The first TAR reported that "[g]roundwater for most of the [tunnel] alignment is anticipated to be above the crown [*i.e.*, the top of the tunnel]," and that, in light of this soil condition, "even . . . fairly extensive dewatering" was not likely to be entirely "[e]ffective." Joint Appendix (JA) 30-31. Accordingly, GZA recommended not only that "some type of closed face tunnel boring machine" be used for the project, but also that "open face tunneling be strictly prohibited on this contract."[2] JA 31.

GZA submitted a revised TAR in January 1993. The second TAR reaffirmed the conclusions of the first, noting that "dewatering considerations dictate closed face mining methods," JA 32, and that "[o]pen faced tunneling in conjunction with dewatering is not judged a viable construction technique on this [c]ontract," JA 33. After reviewing the second TAR, WMATA's Board of Engineers met with GZA.

---

[1] Dewatering systems use a combination of dewatering wells and control piezometers to reduce hydrostatic pressure and to control and remove both groundwater and surface water from the tunnel excavation during construction.

[2] An open face tunnel boring machine is "essentially a cylinder with a digging mechanism in the center of it, much like a backhoe that you might see on the streets of the city." JA 495. A closed face machine is also "a cylinder, but as its name describe[s], the face is closed." JA 495.

Shortly thereafter, in March 1993, GZA issued a third and final TAR, which authorized the use of an open face machine, but cautioned that "[e]xtensive dewatering will be an essential element of the open faced shield option." JA 34. Noting that "effective dewatering of the alignment is at best going to be difficult," the third TAR recommended that "an extensive pre-support grouting/ground improvement program . . . be required for most of the alignment."[3] JA 35.

Following the issuance of the third TAR, GZA calculated the extent of the dewatering and grouting necessary to allow for open face tunneling. Even extensive pre-support grouting would not permit open face tunneling, GZA warned WMATA, "if groundwater is not depressed [through dewatering] the recommended two feet below tunnel invert [*i.e.*, the bottom of the tunnel]." JA 35. WMATA then directed GZA to design an appropriate dewatering system for the project. GZA produced a dewatering design that included over three hundred dewatering wells. JA 1045-46.

On December 6, 1993, WMATA issued an Invitation for Bids ("IFB") on the 14th Street tunnel project. The IFB set forth detailed design specifications and required bidders to submit lump-sum bids for carrying out the work based upon those specifications.[4] WMATA did not include GZA's TARs in the bid package, however, nor did WMATA conform the design specifications to GZA's recommended dewatering system. In particular, WMATA's design specifications called for only 61 dewatering wells. JA 40. Based upon the specifications provided by WMATA, KiSKA submitted a lump-

---

[3] "Pre-support grouting involves drilling holes into the ground in a regular pattern, and then filling them with a fluid mixture of cement, water, and chemicals, which spreads out into the soil and hardens to form a stable, continuous canopy over the tunnel." Br. for Appellant at 8.

[4] A design specification describes in precise detail the materials to be employed and the manner in which the construction work is to be performed. *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1357 (Fed. Cir. 2002).

sum bid of approximately $43 million. WMATA accepted KiSKA's bid and, in early 1994, the two parties signed a construction contract.

B. The Dewatering and Grout Hole Provisions

Section 205 of the contract governed dewatering. It not only set forth a detailed dewatering system for the project, but also required KiSKA to implement the system specified therein: "The Contractor shall proceed with the installation of the specified dewatering system as soon as possible after notice to proceed." Contract § 205, ¶ 1.1(A). Two subsections touched on the question whether the contract required the dewatering system to maintain the groundwater level at two feet below tunnel invert. Section 205(1.2)(B)(3) read, in pertinent part, as follows:

> For mined earth tunnels, additional wells beyond the specified minimum dewatering system may be required to effectively reduce hydrostatic pressure and control groundwater in soil surrounding each tunnel in order to prevent the following:
>
> a. Heaving of the invert, blowups, hazardous seepage and sudden flow of soil in tunnel face.
>
> b. Loss of ground and surface subsidence.
>
> c. Maintain groundwater 2 feet below invert.

Id. § 205, ¶ 1.2(B)(3). Section 205(1.1)(A) also addressed dewatering, stating that "[t]he designed dewatering system may not eliminate all groundwater from the tunnel excavation. The Contractor shall be prepared to support the tunnel face . . . and to handle and convey groundwater from the tunnel to appropriate discharge locations." *Id.* § 205, ¶ 1.1(A). This subsection further provided that "[a]dditional dewatering wells may be required based on the observed performance of the dewatering system." *Id.*

Section 239 of the contract covered pre-support chemical grouting, specifying the precise location of thousands of surface pre-support grout holes to stabilize the soil around the tunnels. In particular, Section 239(1.1)(B) provided that "[p]re-support chemical grouting shall be preformed [sic] from the existing ground surface at locations shown on the contract drawings." *Id.* § 239, ¶ 1.1(B). Although these drawings depicted grout holes drilled vertically at five-foot intervals in a diamond grid pattern, *see* JA 1001, Section 239(3.2)(A) stated that grout piping should be installed "horizontally, vertically or inclined, as required," Contract § 239, ¶ 3.2(A). "In [the] case of [a] discrepancy between Drawings and Specifications," the contract's General Provisions provided that "the Specifications shall govern." JA 755.

C. The Pre-Trial Rulings

During the tunnel's construction, KiSKA experienced a number of difficulties with both the dewatering system and the excavation methods required by the contract. Two complications proved particularly troublesome: (1) the dewatering system specified by WMATA failed to lower the groundwater table two feet below the tunnel invert and (2) the great majority of surface grout holes could not be drilled vertically at their specified locations without damaging underground utility lines. Although KiSKA overcame these difficulties and eventually completed the project, it did so at a cost of almost double its $43 million lump-sum bid. Upon completion of the project, KiSKA filed a five-count complaint against WMATA asserting both tort and contract claims.

Before the case went to trial, the district court issued several pre-trial rulings, three of which KiSKA now challenges on appeal. First, the district court dismissed KiSKA's tort claims on sovereign immunity grounds, holding that "the challenged decisions are 'susceptible to policy judgment,' and therefore immune from judicial review, because they involve planning and design rather than implementation or operation." *KiSKA*

Constr. Corp. v. WMATA, Civ. No. 97-2677 at 5 (D.D.C. Feb. 7, 2000) (mem.) (First Order). Second, the district court held that the contract was "ambiguous, but not patently so," with respect to whether the contract required that the dewatering system maintain the groundwater level at two feet below tunnel invert. *KiSKA Constr. Corp. v. WMATA*, Civ. No. 97-2677 at 7 (D.D.C. June 9, 2000) (mem.) (Second Order).[5] Third, the district court held that while "the contract affords no flexibility with regard to the locations of grout drillings," *KiSKA Constr. Corp. v. WMATA*, Civ. No. 97-2677 at 8 (D.D.C. Dec. 22, 2000) (mem.) (Third Order) (emphasis in original), the contract permitted KiSKA "to drill all grout holes, including surface grout holes, 'horizontally, vertically or inclined,'" *id.* at 9 (quoting Contract § 239, ¶ 3.2(A)).[6]

---

[5] The district court reached this conclusion in the course of rejecting WMATA's motion for partial summary judgment, which had asked the district court to "rule as a matter of law that the contract did not require that the dewatering system lower the groundwater to two feet below the bottom of the tunnel." Second Order at 1.

[6] The district court addressed whether the contract mandated the vertical drilling of grout holes in the course of rejecting WMATA's argument that the contract's "utilities clause" rendered WMATA immune from liability. Third Order at 1-9. The utilities clause provided, in pertinent part, as follows:

> a. . . . The Contract Drawings show some known public and private utilities in their approximate locations within the limits of the project which are expected to interfere with the work. The Contractor is, however, cautioned that these locations are not guaranteed, nor is there any guarantee that utilities lines in existence within the limits of the project have been shown . . . .
>
> b. . . . Before commencing construction, the Contractor shall verify the locations of utilities which may be affected by his operations . . . .

Contract § 101, ¶ III(D)(18).

II. Analysis

We review *de novo* the dismissal of KiSKA's tort claims for lack of subject matter jurisdiction, accepting as true all of the factual allegations contained in the complaint.[7] *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 871 (D.C. Cir. 2002). We review the district court's construction of the contract between KiSKA and WMATA under the same *de novo* standard. *LTV Corp. v. Gulf States Steel, Inc.*, 969 F.2d 1050, 1055 (D.C. Cir.), *cert. denied*, 506 U.S. 1022 (1992) ("Interpretation of the plain

---

[7] Relying on *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197-98 (D.C. Cir. 1992), WMATA argues that we should consider facts outside of the pleadings in reviewing the district court's dismissal of KiSKA's tort claims. We disagree. Under settled law, the district court may dispose of a motion to dismiss for lack of subject matter jurisdiction "on the complaint standing alone." *Id.* at 197. Nevertheless, where necessary, the district court may also consider undisputed facts evidenced in the record or disputed facts resolved by the district court. *Id.* As we explained in *Herbert*, however, "[t]he posture in which the motion is presented to [the] trial court has a profound effect on the manner in which this Court will review its disposition." *Id.*

The district court's February 7, 2000 Memorandum Opinion dismissing KiSKA's tort claims indicates—in a footnote—that "[a] more thorough summary of the facts of this case can be found in the Court's Memorandum Opinion of June 19, 1998." First Order at 2 n.2. This earlier opinion, which denied WMATA's first motion to dismiss, "deduced" certain jurisdictional facts "as presented in the [c]omplaint and the contract." *KiSKA Constr. Corp. v. WMATA*, Civ. No. 97-2677 at 2 (D.D.C. June 19, 1998) (mem.). WMATA relies upon the district court's "incorporation" of the previously "deduced" facts in support of its position that the district court looked beyond the four corners of the complaint in dismissing KiSKA's tort claims on sovereign immunity grounds. WMATA is mistaken. A review of the district court's February 7, 2000 Memorandum Opinion reveals that the district court made no determination of disputed jurisdictional facts in holding that KiSKA's tort claims involved discretionary decisions evincing policy judgment and, as a result, that the claims were barred by sovereign immunity. First Order at 3-7. Given that the district court accepted as true the factual allegations of the complaint, *see id.* at 1-7, "the only matter[ ] before us on appeal [is] whether the [d]istrict [c]ourt's application of the law is correct," *Herbert*, 974 F.2d at 197.

language of a contract is a question of law subject to *de novo* review by this court.").

A. Sovereign Immunity

On appeal, KiSKA argues that the district court erred by dismissing its two tort claims—fraudulent misrepresentation and negligent misrepresentation—on sovereign immunity grounds. Rejecting the district court's conclusion that WMATA had "broad discretion in defining the contours of the invitation for bids," First Order at 6, KiSKA asserts that WMATA lacks the "'discretion' to conceal and/or misrepresent material information" from contractors and that "such tortious conduct does not involve the exercise of a 'policy judgment,'" Br. for Appellant at 20. Thus, KiSKA maintains, sovereign immunity does not shield WMATA from KiSKA's tort claims.

1. Discretionary Functions vs. Ministerial Functions

WMATA is the product of an interstate compact entered into by Maryland, Virginia and the District of Columbia. *Watters v. WMATA,* 295 F.3d 36, 39 (D.C. Cir. 2002). We have frequently recognized that, "'[a]s a quasi-governmental entity created by its signatory parties, WMATA is entitled to share the sovereign immunity of those parties with respect to common law tort actions.'" *Beatty v. WMATA,* 860 F.2d 1117, 1126 (D.C. Cir. 1988) (quoting *Heffez v. WMATA,* 569 F. Supp. 1551, 1552 (D.D.C. 1983)). We have also acknowledged, however, that section 80 of the WMATA Compact provides a limited waiver of WMATA's sovereign immunity for torts "'committed in the conduct of any proprietary function,'" but not for torts occurring "'in the performance of a governmental function.'" *Beebe v. WMATA,* 129 F.3d 1283, 1287 (D.C. Cir. 1997) (quoting D.C. Code Ann. § 9-1107.01(80)). Unless the limited waiver of immunity applies, "the district court lacks jurisdiction to enter a judgment against [WMATA]." *Watters,* 295 F.3d at 39-40.

Because "the distinction between proprietary and governmental functions has created a 'quagmire that has long plagued the law of municipal corporations,'" *Beatty*, 860 F.2d at 1126 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955)), we have interpreted section 80 "as incorporating the distinction between discretionary and ministerial functions," a dichotomy set forth in the Federal Tort Claims Act ("FTCA"), *Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987). Given that "[o]nly those activities considered 'discretionary' are shielded by sovereign immunity," *Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997), WMATA's immunity "turns on whether the [challenged] activity is 'discretionary' or 'ministerial,'" *Beebe*, 129 F.3d at 1287.[8]

To determine whether a WMATA activity is discretionary, and thus shielded by sovereign immunity, we apply a two-part test culled from the FTCA's "discretionary function" jurisprudence.[9] *See id.* First, we ask "whether any '"statute, regulation, or policy specifically prescribes a course of action for an employee to follow."'" *Id.* (quoting *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995) (quoting *United States v. Gaubert*, 499 U.S. 315, 322 (1991))). If a course of action is so prescribed, "sovereign immunity does not bar suits based on an

---

[8] WMATA's sovereign immunity likewise extends to "quintessential" governmental functions, such as law enforcement. *Beebe*, 129 F.3d at 1287. Indeed, we typically ask whether the challenged activity amounts to a "quintessential" governmental function before asking whether the activity is "discretionary" or "ministerial." *See id.* We need not ask the former question here, however, because "WMATA has not attempted to shoe-horn its activities into this narrow category of conduct." First Order at 4 n.4.

[9] We have described the distinction between "discretionary" and "ministerial" functions as follows: "'Generally speaking, a duty is discretionary if it involves judgment, planning, or policy decisions. It is not discretionary [*i.e.*, ministerial] if it involves enforcement or administration of a mandatory duty at the *operational level*, even if professional expert evaluation is required.'" *Beatty*, 860 F.2d at 1127 (emphasis in original) (quoting *Jackson v. Kelly*, 557 F.2d 735, 737-38 (10th Cir. 1977)).

employee's failure to follow the prescribed course of conduct." *Burkhart*, 112 F.3d at 1217. If the governing statutes or regulations leave room for the exercise of discretion, however, we ask a second question: "whether the exercise of discretion is 'grounded in "social, economic, or political goals."'" *Beebe*, 129 F.3d at 1287 (quoting *Cope*, 45 F.3d at 448 (quoting *Gaubert*, 499 U.S. at 323)). If the exercise of discretion is so grounded, and hence "susceptible to policy judgment," *Cope*, 45 F.3d at 448, the "activity is 'governmental,' thus falling within section 80's retention of sovereign immunity," *Beebe*, 129 F.3d at 1287.

2. The Contents of the Bid Package: A Discretionary Decision?

This case poses the following question: does WMATA's discretion to select a particular project design encompass the discretion to determine the content of that project's bid package?[10] On appeal, KiSKA answers this question in the negative, arguing that (1) WMATA lacks the discretion to "conceal and/or misrepresent material information" from

---

[10] Not surprisingly, the parties disagree as to whether KiSKA's tort claims amount to a challenge to WMATA's design decisions. This dispute reflects the fact that we have long held that WMATA's design decisions are discretionary functions shielded by sovereign immunity. *See, e.g., Souders v. WMATA*, 48 F.3d 546 (D.C. Cir. 1995) (WMATA immune from challenge to noise level guidelines); *Dant*, 829 F.2d at 73-75 (WMATA immune from challenge to fare collection system). A careful reading of the complaint reveals, however, that KiSKA's tort claims stem from WMATA's decision not to include GZA's three TARs in the bid package and not WMATA's decision to select a particular project design over another. JA 24-66.

KiSKA's reliance upon *Beatty* is similarly misplaced. Although *Beatty* recognized that WMATA may be held "liable for a broad range of conduct which implements its discretionary decisions," *Beatty*, 860 F.2d at 1127, the case involved the *implementation* of a design decision, *i.e.*, the Red Line's uninstalled iron beams. It thus sheds no light on whether WMATA's selection of a particular bid package is more properly cast as a "design" decision or as an "implementation" decision.

contractors and (2) "such tortious conduct does not involve the exercise of a 'policy judgment.'" Br. for Appellant at 20.[11]

Applying the two-stage analysis outlined above, *see supra* Part II.A.1, we find that KiSKA has failed to cite any statute, regulation or policy that "specifically prescribes" the content of WMATA's IFBs. Unable to identify support for its position within the four corners of the WMATA Compact, KiSKA relies upon two external sources of authority to argue that WMATA failed, in this case, to follow the prescribed course of conduct: (1) contract cases that recognize a government agency's duty to disclose pertinent facts to contractors with whom the agency contracts, Br. for Appellant at 23-24, and (2) a Federal Transit Administration ("FTA") circular providing that all contract solicitations must "'[i]ncorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured,'" *id.* at 24 (quoting JA 1068).

KiSKA maintains that the general obligation to abide by the covenant of good faith and fair dealing "specifically prescribed" the contents of the bid package, requiring WMATA to disclose to KiSKA all "material" information. We disagree. Although the covenant of good faith and fair dealing undoubtedly constrains WMATA's behavior within the context of its contractual relationships, KiSKA's misrepresentation claims sound in tort, not contract. Given that section 80 distinguishes between tort claims and contract claims, affording a limited waiver of sovereign immunity with respect to the former and a

---

[11] Noting that the FTCA contains both a "discretionary function" exception and a "misrepresentation" exception to the waiver of sovereign immunity contained therein, whereas the WMATA Compact includes only the former, KiSKA also argues that section 80 does not afford WMATA immunity from tort suits alleging claims of misrepresentation. But, as WMATA correctly observes, we have previously upheld the dismissal of fraud and misrepresentation claims against WMATA where the challenged activities involved discretionary decisions. *See Beebe,* 129 F.3d at 1286, 1288.

complete waiver of sovereign immunity with respect to the latter, D.C.Code Ann. § 9-1107.01(80), we must agree with the district court's conclusion that the covenant of good faith and fair dealing "is not the kind of *specific* dictate that renders WMATA's acts merely ministerial," First Order at 6 (emphasis in original). *Cf. Burkhart,* 112 F.3d at 1217 (holding that employment provisions of WMATA Compact "hardly constrain" WMATA's discretion over whom it will employ and how it will train and supervise employees).

The FTA circular likewise fails to circumscribe WMATA's discretion with respect to the contents of the bid package.[12] A regulation constrains discretion if it "'specifically prescribes a course of action for an employee to follow'" such that "'the employee has no rightful option but to adhere to the directive.'" *Gaubert,* 499 U.S. at 322 (quoting *Berkovitz v. United States,* 486 U.S. 531, 536 (1988)). Although the FTA circular obligates WMATA to "[i]ncorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured," JA 1068, the circular does not "specifically prescribe" a course of action for WMATA to follow in specifying the contents of a bid package. In our view, an administrative ukase that mandates only clarity and accuracy does not constrain WMATA's discretion with respect to the particular documents to include within a bid package. *Cf. Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1023 (D.C. Cir. 2000). Given KiSKA's failure to produce persuasive authority to the contrary, we conclude that WMATA had broad discretion to determine the contents of the tunnel project's bid package.[13]

---

[12] Although WMATA claims that KiSKA did not rely upon the FTA circular before the district court, the record indicates otherwise. JA 135. Accordingly, KiSKA has not waived this argument.

[13] As WMATA correctly observes, at least one court has expressly held that government decisions regarding the content of plans and specifications provided to contractors are immune discretionary functions. *See Frank*

Next, KiSKA argues that WMATA cannot satisfy the second step of the sovereign immunity inquiry, *i.e.*, whether the exercise of such discretion is "grounded in social, economic, or political" policy. *Cope,* 45 F.3d at 448 (internal quotations omitted). As we recognized in *Cope,* "[d]etermining whether a decision is 'essentially political, social, or economic' is admittedly difficult, since nearly every government action is, at least to some extent, subject to 'policy analysis.'" *Id.* (quoting *Red Lake Band of Chippewa Indians v. United States,* 800 F.2d 1187, 1195 (D.C. Cir. 1986)). "'Budgetary constraints,'" we observed, "'underlie virtually all economic activity.'" *Id.* at 449 (quoting *ARA Leisure Servs. v. United States,* 831 F.2d 193, 196 (9th Cir. 1987)).

To avoid the exception swallowing the rule, we have held that the "mere association of a decision with regulatory concerns is not enough [to render that decision 'discretionary']; exempt decisions are those 'fraught with ... public policy considerations.'" *Id.* (quoting *Sami v. United States,* 617 F.2d 755, 767 (D.C. Cir. 1979)). We therefore concluded in *Cope* that "[t]he mere presence of choice—even if that choice involves whether money should be spent—does not trigger the [discretionary function] exemption." *Id.*

WMATA argues that its "employees had to, and did, exercise judgment when they decided that the [bid package] would not benefit from [the] inclusion of superseded, discarded design concepts." Br. for Appellee at 31. Citing the court's decision in *Red Lake*, WMATA maintains that its decisions regarding the manner in which its policies are implemented or enforced are "themselves discretionary because such decisions directly affect the feasibility and practicality of the program, and require

---

Briscoe Co. v. County of Clark, 643 F. Supp. 93, 97-98 (D. Nev. 1986), *aff'd,* 857 F.2d 606 (9th Cir. 1988) (interpreting discretionary function exemption under Nevada law in accordance with FTCA principles). Unfortunately, the *Frank Briscoe* decision contains little reasoning in support of its decision. *See id.*

the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding." *Id.* at 31-32 (quoting *Red Lake,* 800 F.2d at 1196 (internal quotations omitted)). WMATA thus reasons that its "decision not to include thousands of pages of draft or superseded design documents in the bid package is a perfect example of such discretion." *Id.* at 32.

While KiSKA's claim presents a closer question than those decided in cases past, we believe that the district court correctly held that WMATA's discretionary decision to exclude certain design documents from the tunnel project's bid package is "susceptible to policy judgment." *Cope,* 45 F.3d at 448. Specifically, WMATA's decision required consideration of budgetary constraints and economic expediency. While at first glance WMATA's fiscal considerations may appear to pale in comparison to those implicated in hiring decisions, *see Beebe,* 129 F.3d at 1287-88; *Burkhart,* 112 F.3d at 1217, those considerations involve more than simply packaging, duplication and distribution costs. If WMATA were to release unreliable or mistaken reports indicating an inflated need for dewatering wells, for example, the reports could cause contractors to similarly inflate their bids. Of course, WMATA may not withhold all unfavorable information from contractors; if it did, WMATA might soon find few firms willing to submit bids on its projects. WMATA must therefore exercise its policy judgment to balance the goal of fair disclosure against the sensible withholding of unreliable information.

Although KiSKA argues that WMATA's position "assumes the *merits* of the issue, *i.e.*, that the information concealed from bidders was not 'material,'" Reply Br. at 9 (emphasis in original), KiSKA's position, in contrast—given that the merits of a claim will rarely be known before a court establishes its jurisdiction over that claim—would permit endless contractor challenges to WMATA's final specifications. While KiSKA

may disagree with WMATA's decisions regarding the materiality of a given set of documents, such judgments are, in our view, WMATA's to make. We therefore conclude that the content of the tunnel project's bid package is a discretionary decision susceptible to policy judgment and, accordingly, affirm the district court's dismissal of KiSKA's tort claims on sovereign immunity grounds.[14]

B. The Contract Provisions

KiSKA's remaining challenges involve the district court's interpretation of two contract provisions: section 205 (dewatering) and section 239 (pre-support grouting). Both challenges rely upon *United States v. Spearin,* 248 U.S. 132 (1918), "[t]he seminal case recognizing a cause of action for breach of contractual warranty of specifications," *Hercules Inc. v. United States,* 516 U.S. 417, 424 (1996), which held that "if [a] contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications," *Spearin,* 248 U.S. at 136 at 61. Relying on *Spearin,* KiSKA argues that WMATA warranted by implication that (1) its dewatering system would lower the groundwater table in the project area two feet below the tunnel invert and (2) the surface pre-support grout holes required under the contract could be drilled vertically at the precise locations specified by WMATA.

1. The Dewatering System

KiSKA maintains that the district court erred as a matter of law in holding that the contract was "ambiguous" as to whether the contract required—and thus warranted—that the dewatering system would lower the groundwater table in the project area

---

[14] Given our conclusion that the district court correctly dismissed KiSKA's tort claims on sovereign immunity grounds, we need not consider WMATA's alternative argument that the district court's dismissal of KiSKA's tort claims constituted "harmless error."

two feet below the tunnel invert. Relying chiefly on section 205(1.2)(B)(3), KiSKA argues that the contract specifically and unambiguously warranted that the groundwater table would be lowered two feet below the invert of the tunnel by the dewatering system WMATA designed. In KiSKA's view, none of the provisions relied on by WMATA abrogates the "clear" statement contained in section 205(1.2)(B)(3) and, accordingly, KiSKA claims that its reading of the contract provides the only "reasonable" interpretation of the dewatering provisions contained therein. Its argument fails.

Section 205(1.2)(B)(3) provided that "[f]or mined earth tunnels, additional wells beyond the specified minimum dewatering system may be required to . . . control groundwater in [the] soil surrounding each tunnel in order to . . . *[m]aintain* groundwater 2 feet below invert." Contract § 205, ¶ 1.2(B)(3) (emphasis added). Noting that the groundwater table could not be "maintain[ed]" two feet below the tunnel invert if it was not already at that level, KiSKA asserts that section 205 required, and hence warranted, that WMATA's dewatering system would indeed lower the groundwater table to two feet below tunnel invert. In KiSKA's view, its reading of section 205(1.2)(B)(3) is confirmed by section 228(1.5)(A)(2)(a)((1)), which provided: "The water table *shall* be lowered as specified in the Specification Section 205." *Id.* § 228, ¶ 1.5(A)(2)(a)((1)) (emphasis added).

WMATA, however, reads section 205(1.2)(B)(3) not as an implied warranty but as "a statement that the minimum dewatering system *might not* lower the groundwater to two feet below invert [and that KiSKA] might have to install additional wells to accomplish that goal." Br. for Appellee at 40 (emphasis in original).[15] According to WMATA, section

---

[15] WMATA also maintains that KiSKA waived any challenge to the district court's ruling that the dewatering provisions were ambiguous because KiSKA never made its own motion seeking a ruling that the contract was unambiguous. This argument is without merit. Although the district court

205(1.1)(A) likewise put KiSKA on notice that groundwater may remain in the tunnel despite the dewatering system. Contract § 205, ¶ 1.1(A) ("The designed dewatering system may not eliminate all groundwater from the tunnel excavation."). WMATA further asserts that both section 228(1.5)(A)(1) and section 228(3.5)(A) suggest that groundwater could remain above the tunnel invert without violating the contract. *Id.* § 228, ¶ 1.5(A)(1) (providing that KiSKA must "[c]ontrol groundwater along the tunnel alignment and *within the tunnel heading* to prevent" certain specified events from occurring) (emphasis added); *id.* § 228, ¶ 3.5(A) ("If the tunnel invert is *below* groundwater level, [KiSKA must] maintain qualified personnel on duty to monitor conditions that might threaten stability of heading whenever tunnel excavation is suspended or shut down.") (emphasis added).

The law requires contracts to be read as a whole, with meaning given to every provision contained therein. *See Fort Sumter Tours, Inc. v. Babbitt,* 202 F.3d 349, 357 (D.C. Cir. 2000) (citing *United States v. Ins. Co. of N. Am.*, 83 F.3d 1507, 1511 (D.C. Cir. 1996) (noting the "'cardinal principle of contract construction: that a document should be read to give effect to all its provisions'") (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995))). If the contract "is susceptible to more than one reasonable interpretation," however, the court must find that the contract is ambiguous as a matter of law. *Metric Constructors, Inc. v. NASA,* 169 F.3d 747, 751 (Fed. Cir. 1999).

If the court finds the contract to be ambiguous, it must then determine whether that ambiguity is patent or latent. *Id.* An

---

ruled on WMATA's motion for summary judgment, *both* KiSKA and WMATA argued that they offered the only reasonable interpretation of the contract's dewatering provisions. Second Order at 5. As KiSKA correctly observes, once the district court held that the contract was "ambiguous" in this regard, KiSKA did not need to file its own motion for summary judgment in order to preserve the issue for appeal.

ambiguity is patent if it is "glaring, substantial, or patently obvious." *Comtrol, Inc. v. United States,* 294 F.3d 1357, 1365 (Fed. Cir. 2002). Patent ambiguities are construed against a government contractor absent an inquiry "about the correct meaning of the terms at issue." *P.R. Burke Corp. v. United States,* 277 F.3d 1346, 1353 (Fed. Cir. 2002). If the ambiguity is "neither glaring nor substantial nor patently obvious," *Grumman Data Sys. Corp. v. Dalton,* 88 F.3d 990, 997 (Fed. Cir. 1996) (internal quotations omitted), however, and therefore latent, the ambiguity is ordinarily construed against the drafting party, *see, e.g., Jowett, Inc. v. United States,* 234 F.3d 1365, 1368 & n.2 (Fed. Cir. 2000).

Applying these principles, the district court concluded that both KiSKA and WMATA proposed reasonable interpretations of the contract's dewatering provisions, holding the contract to be "ambiguous, but not patently so." Second Order at 7. We disagree and find the provisions to be patently—not latently—ambiguous.

Although KiSKA provides a sensible explanation for each of the provisions relied upon by WMATA,[16] we do not accept KiSKA's assertion that section 205(1.2)(B)(3) provided a "clear" statement that WMATA warranted that its design would lower the groundwater table two feet below tunnel invert. The grammatical difficulties of the provision aside, *see infra* note 17, section 205(1.2)(B)(3) cannot, in our opinion, carry the interpretive weight placed upon it by KiSKA. Contract § 205,

---

[16] Responding to WMATA's reliance on section 205(1.1)(A), KiSKA argues that "[a] recognition that the system might not eliminate every last isolated pocket of groundwater from the project area . . . is in no way inconsistent with a warranty that the design would lower the overall groundwater *table* for the project area two feet below the invert." Br. for Appellant at 33 (emphasis in original). Similarly, discussing WMATA's reliance on section 228(3.5)(A), KiSKA asserts that the provision "merely anticipated a contingency in the event that the groundwater table were to rise above the invert." *Id.*

¶ 1.2(B)(3). Section 228(1.5)(A)(2)(a)((1)) likewise fails to advance KiSKA's cause as it appears to speak to the manner of dewatering and not to the level at which the groundwater must be maintained. *Id.* § 228, ¶ 1.5(A)(2)(a)((1)).

In our view, the grammatical errors of section 205(1.2)(B)(3) render the ambiguity of the dewatering provisions sufficiently obvious that KiSKA had a duty to inquire as to the true meaning of the contract.[17] *See P.R. Burke Corp.*, 277 F.3d at 1353. By failing to so inquire, KiSKA assumed the risk that the government would offer a reasonable, but conflicting, interpretation, *see Triax Pacific, Inc. v. West,* 130 F.3d 1469, 1474-75 (Fed. Cir. 1997), which interpretation would then be accepted by the court—a risk realized by our rejection of KiSKA's claim, *see Jowett,* 234 F.3d at 1368 & n.2.

2. Pre-Support Grout Holes

Finally, KiSKA argues that the district court erred as a matter of law by holding that, while "the contract affords no flexibility with regard to the *locations* of grout drillings," Third Order at 8 (emphasis in original), the contract "permitted [KiSKA] to drill all grout holes, including surface grout holes, 'horizontally, vertically or inclined,'" *id.* at 9 (quoting Contract § 239, ¶ 3.2(A)). Specifically, KiSKA maintains that the contract specified that "all such grout holes must be drilled vertically." Br. for Appellant at 37-38. Because KiSKA could not drill the surface grout holes vertically at many of the locations specified in the contract without drilling into existing utilities, KiSKA reasons that WMATA breached its contractual warranty of specifications. We reject KiSKA's argument.

---

[17] As WMATA observes on appeal, the applicability of the verb "prevent" to section 205(1.2)(B)(3)(c) "makes no sense grammatically or syntactically." Br. for Appellee at 40 n.15. KiSKA maintains, however, that "[r]ead in context, it is perfectly clear that the verb 'prevent' does not apply to the clause beginning '[m]aintain.'" Reply Br. at 18 n.6.

Section 239(1.1)(B) provided that "[p]re-support chemical grouting shall be preformed [sic] from the existing ground surface at locations shown on the contract drawings." Contract § 239, ¶ 1.1(B). As even WMATA concedes, the contract drawings depicted the surface grout holes as drilled vertically. *See* JA 1001. Yet section 239(3.2)(A) provided that grout pipes were to be installed "horizontally, vertically or inclined, as required." Contract § 239, ¶ 3.2(A). Observing that the contract contained "no clear directive that the [surface grout] holes should be drilled at a particular angle," the district court concluded that "the flexible language of [section 239(3.2)(A)] applies." Third Order at 8-9. Accordingly, the district court held that "the contract permitted [KiSKA] to drill all grout holes, including surface grout holes, 'horizontally, vertically or inclined.'" *Id.* at 9 (quoting Contract § 239, ¶ 3.2(A)).

On appeal, KiSKA argues that the district court's reliance upon section 239(3.2)(A) was misplaced because the provision "did not remotely purport to override any other provisions of the contract requiring particular grout holes to be drilled at particular angles." Br. for Appellant at 40. KiSKA places particular emphasis upon the fact that section 239(3.2)(A) provided that "the contractor shall drill grout holes 'as required.'" *Id.* at 41 (quoting Contract § 239, ¶ 3.2(A)). Because the contract drawings depicted the grout holes as drilled vertically, KiSKA argues that the contract "required" the surface grout holes to be drilled vertically, thus warranting that the surface grout holes *could* be drilled vertically.

We find that KiSKA's reading of the contract places too much emphasis on the contract drawings, while ignoring other crucial provisions of the contract. As WMATA correctly observes, General Provision No. 2 of the contract clearly stated that "[i]n [the] case of [a] discrepancy between Drawings and Specifications, the Specifications shall govern." JA 755. Given that the contract unambiguously indicated that WMATA did not know the location of the utilities and, in addition, expressly

assigned KiSKA the responsibility of ultimately locating the utilities, KiSKA's reading of the contract cannot stand. *See, e.g.*, Contract § 101, ¶ III(D)(18)(a) ("The Contract Drawings show some known public and private utilities in their approximate locations within the limits of the project which are expected to interfere with the work. The Contractor is, however, cautioned that these locations are not guaranteed, nor is there any guarantee that utilities lines in existence within the limits of the project have been shown."); *id.* § 101, ¶ III(D)(18)(b) ("Before commencing construction, the Contractor shall verify the locations of utilities which may be affected by his operations."); *id.* § 207, ¶ 1.5(A)(2) ("[The contractor must] [v]erify by field investigation locations of [utility] facilities within and adjacent to limits of project which may be affected by construction operations."). Read in conjunction with section 239(3.2)(A)'s mandate to drill surface grout holes "horizontally, vertically or inclined, as required," *id.* § 239, ¶ 3.2(A), the aforementioned provisions sufficiently refute KiSKA's warranty argument.[18]

III. Conclusion

For the foregoing reasons, we conclude that (1) sovereign immunity bars KiSKA's tort claims; (2) the contract did not unambiguously provide that the specified dewatering system would maintain the groundwater level two feet below tunnel invert; and (3) the contract did not require KiSKA to drill surface grout holes vertically. The judgment below is therefore

Affirmed.

---

[18] Because we conclude that the district court correctly interpreted the contract's dewatering and grout hole provisions, we need not consider WMATA's alternative argument that any error the district court committed in interpreting the contract was harmless.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KiSKA CONSTRUCTION CORPORATION-USA, and KAJIMA ENGINEERING AND CONSTRUCTION, INC., Plaintiffs, v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Defendant.	Civil Action No. 97-2677 (CKK)

MEMORANDUM OPINION

On February 25, 1994, the Washington Metropolitan Area Transit Authority ("WMATA") awarded a contract to KiSKA-Kajima, a joint venture of Plaintiffs KiSKA Construction Corporation-USA and Kajima Engineering and Construction, Inc., to construct a new tunnel for the Washington, DC area subway system ("Metro"). On November 10, 1997, after experiencing various difficulties completing the project, KiSKA-Kajima sued WMATA for Fraudulent Misrepresentation (Count I), Negligent Misrepresentation (Count II), Unilateral Mistake (Count III), Material Breach of Contract (Count IV), and Quantum Meruit (Count V). Before the Court is WMATA's motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h)(3).[1] In support of its motion to dismiss,

[1] This is WMATA's second motion to dismiss, which was filed on the same day as crossmotions for summary judgment. WMATA's first motion to dismiss was denied on June 19, 1998.

WMATA argues that the Court lacks subject matter jurisdiction over all five counts because WMATA has not waived its sovereign immunity for torts occurring in the performance of its governmental or discretionary functions. Upon review of WMATA's motion to dismiss, KiSKA-Kajima's opposition, WMATA's reply, and the allegations contained in the complaint, the Court finds that KiSKA-Kajima's tort claims against WMATA (Counts I and II only) are barred by the doctrine of sovereign immunity.

I. BACKGROUND[2]

Before soliciting bids for the 14th Street Tunnels Project (the "project"), WMATA retained geotechnical consultants to study the feasibility of various tunneling methods and equipment, dewatering systems, and pre-support chemical grouting for the project. One such consultant, GeoEnvironmental, Inc. ("GZA"), prepared a series of three reports containing recommendations for how best to construct the tunnel. WMATA did not disclose GZA's reports to KiSKA-Kajima at any time during the bidding process, nor did WMATA conform the contract to GZA's recommendations. Based on the information provided by WMATA, KiSKA-Kajima submitted a bid for the contract, which was accepted by WMATA. Shortly after beginning work on the tunnel, KiSKA-Kajima began experiencing difficulties with the dewatering system and the excavation methods required by the contract. KiSKA-Kajima told WMATA about these unforeseen complications, which were delaying the progress of the project, but WMATA insisted that KiSKA-Kajima use the methods prescribed by the contract. Forced to complete the project under these circumstances, KiSKA-Kajima incurred additional expenses over the bid amount.

---

[2] A more thorough summary of the facts of this case can be found in the Court's Memorandum Opinion of June 19, 1998.

In Counts I and II, KiSKA-Kajima contends that WMATA fraudulently and negligently misrepresented that WMATA would implement an effective dewatering system and that the tunneling methods prescribed by the contract were feasible, while concealing GZA's recommendations that closed face mining should be used, that dewatering would be costly and ineffective, and that pre-support grouting would be ineffective if the dewatering was not effective. As a result of WMATA's misrepresentations and failures to disclose, KiSKA-Kajima avers in Count III that it labored under a unilateral mistake as to the cost, duration, and feasibility of the project. In Count IV, KiSKA-Kajima alleges that WMATA materially breached the contract, including various express and implied warranties contained therein. In the fifth and final count, KiSKA-Kajima seeks compensation for work performed outside the contract under quantum meruit.

II. DISCUSSION

WMATA was created in 1966, when Congress approved an interstate compact among Maryland, Virginia, and the District of Columbia to jointly develop and administer a comprehensive mass transit system for the Washington, DC metropolitan area. *See Beebe v. WMATA*, 129 F.3d 1283, 1285 (D.C. Cir. 1997); D.C. Code Ann. § 1-2431 (1999) (codifying the Washington Metropolitan Area Transit Authority Compact) (the "Compact"). Although WMATA is merely a quasi-governmental entity, its claim to sovereign immunity is well-established. *See Beatty v. WMATA*, 860 F.2d 1117, 1126 (D.C. Cir. 1988) (noting that WMATA shares the immunity enjoyed by the signatory parties to the Compact); *Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987) (discussing the scope of WMATA's sovereign immunity); *Morris v. WMATA*, 781 F.2d 218, 222-28 (D.C. Cir. 1986) (holding that WMATA enjoys the same immunity conferred by the Eleventh Amendment on Virginia and Maryland). Section 80 of the Compact waives WMATA's immunity under certain

circumstances, providing in relevant part that WMATA "shall be liable for its contracts and for its torts . . . committed in the conduct of any proprietary function, . . . but shall not be liable for any torts occurring in the performance of a governmental function." D.C. Code Ann. § 1-2431(80). Resolution of WMATA's motion to dismiss hinges on whether the acts and omissions alleged in KiSKA-Kajima's complaint are governmental or proprietary within the meaning of section 80.

Over the years, the DC Circuit has developed a series of three questions to aid courts in distinguishing governmental functions, for which WMATA is immune, from proprietary functions, for which WMATA is amenable to suit.[3] First, the court must "ask whether the activity amounts to a 'quintessential' governmental function, like law enforcement." *See Beebe*, 129 F.3d at 1287 (citing *Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997)). WMATA is clearly immune from suit for torts arising out of such activities. *See Morris v. WMATA*, 781 F.2d 218, 220-21 (D.C. Cir. 1986). Where, as here, the activity in question cannot be characterized as a "quintessential" governmental function,[4] the D.C. Circuit draws upon the Federal Tort Claims Act's dichotomy between "discretionary" and "ministerial" acts. *See Beebe*, 129 F.2d at 1287. Under this rubric, the court asks first "whether any 'statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" *Id.* (quoting *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995)). If the course of action is so prescribed, the conduct is ministerial rather than discretionary and WMATA is not immune from suit. *See Burkhart*, 112 F.3d

---

[3] Given the breadth of caselaw from this jurisdiction that mines the distinction between governmental and proprietary functions for the specific purpose of defining the scope of WMATA's immunity under section 80, KiSKA-Kajima's reliance on cases from outside this jurisdiction is sorely misplaced.

[4] Happily, WMATA has not attempted to shoe-horn its activities into this narrow category of conduct.

at 1216 (distinguishing statutes that leave room for choice); *Beatty*, 860 F.2d at 1127 (finding that a duty is ministerial "if it involves enforcement or administration of a mandatory duty at the operational level.") (quoting *Jackson v. Kelly*, 557 F.2d 735, 737-38 (10th Cir. 1977). If no course of action is prescribed, the court reaches the final part of its analysis: "whether the exercise of discretion is grounded in social, economic, or political goals. If so grounded, the activity is governmental, thus falling within section 80's retention of sovereign immunity." *Id.* (internal quotations and citations omitted).

Applying this test to the case at bar, the Court finds that the challenged decisions are "susceptible to policy judgment," and therefore immune from judicial review, because they involve planning and design rather than implementation or operation. *See Beatty*, 860 F.2d at 1126-27 (WMATA not immune if plaintiff's nuisance claim is based on operation of the Metro rather than design); *Dant*, 829 F.2d at 74 (WMATA immune from challenge to design of fare collection system); *Warren v. WMATA*, 880 F. Supp. 14, 19 (D.D.C. 1995) (WMATA immune because the choice between two types of glass, both of which conform to the relevant standard, is a discretionary design decision). KiSKA-Kajima cannot point to any statute, regulation or policy that "specifically prescribes" WMATA's choice of tunneling methods or the content of its invitations for bids. *See Burkhart*, 112 F.3d at 1217 (finding that WMATA's broad powers to create and abolish employments and establish a personnel system "hardly constrain WMATA's determination of whom it will employ or how it will train and supervise its employees"); *Warren*, 880 F. Supp. at 17 (noting that the District of Columbia's regulations specifically required that WMATA equip its vehicles with safety glazing materials, affording WMATA discretion among types of materials so long as its choice complies with the standard). WMATA's general obligation to abide by the covenant of good faith and fair

dealing is not the kind of *specific* dictate that renders WMATA's acts merely ministerial.

This lack of mandatory constraints provided WMATA broad discretion in defining the contours of the invitation for bids and the resulting contract with KiSKA-Kajima. KiSKA-Kajima characterizes these decisions as "technical, geologic, engineering, constructability decisions and self-interested decisions not designed to be protected by sovereign immunity," Pl.'s Opp'n at 18, but upon closer examination the Court finds that such choices are susceptible to policy judgment. Like the hiring, training and supervision choices at issue in *Burkhart*, WMATA's choice of tunneling methods requires consideration of budgetary constraints, economic conditions, and the need to ensure public safety. *See Burkhart*, 112 F.3d at 1217. As the DC Circuit noted in *Beatty*, "[t]he cases teach that WMATA will not be liable for determinations made in establishing 'plans, specifications or schedule of operations' for the Metrorail." *Beatty*, 860 F.2d at 1127 (quoting *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953)); *see also Dant*, 829 F.2d at 74 (characterizing the decision to install an automated fare collection system as a "complex design decision approved by WMATA in the exercise of its policy discretion"). Notwithstanding KiSKA-Kajima's efforts to characterize WMATA's decisions as purely technical, the Court finds that the contested decisions implicate "'not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency.'" *Warren*, 880 F. Supp. at 19 (declining to second-guess WMATA's decision to use a certain kind of glass for bus windows) (quoting *Cope*, 45 F.3d at 450). Because section 80 renders WMATA "immune from courts' 'second-guessing' through private tort suits 'the political, social, and economic judgments of an agency exercising its regulatory function,'" *Dant*, 829 F.2d at 74, KiSKA-Kajima's tort claims must be dismissed.

III. CONCLUSION

For the reasons stated above, KiSKA-Kajima's tort claims (Counts I and II) must be dismissed for lack of subject matter jurisdiction. The Court rejects WMATA's suggestion that all of KiSKA-Kajima's remaining contract claims are "tort claims masquerading as such." WMATA's Reply at 17. KiSKA-Kajima is clearly entitled to pursue alternative theories of recovery based on the same set of facts, and section 80 specifically waives WMATA's immunity from suit for its contracts. Because KiSKA-Kajima is not seeking punitive damages in connection with its remaining claims, the Court will deny as moot WMATA's motion to dismiss KiSKA-Kajima's request for punitive damages. As for WMATA's efforts to dismiss KiSKA-Kajima's request for pre-judgment interest, the Court will address this issue, if necessary, after the entry of judgment.

An order accompanies this memorandum opinion.

February 7, 2000

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

Copies to:
Mark Sgarlata, Esq.
Watt, Tieder & Hoffar, LLP
7929 Westpark Drive, Suite 400
McLean, VA 22102

Philip Staub, Esq.
WMATA
600 Fifth Street, NW
Washington, DC 20001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KISKA CONSTRUCTION CORPORATION - U.S.A. **18-10 Whitestone Expressway** **Whitestone, New York 11357** **a Partner in** **KISKA-KAJIMA, a Joint Venture,**	
and	
KAJIMA ENGINEERING AND CONSTRUCTION, INC. **200 S. Los Robles Ave., #400** **Pasadena, California 91101** **a Partner in** **KISKA-KAJIMA, a Joint Venture,**	**CASE NUMBER: 1:97CV02677**
Plaintiff,	**JUDGE: Colleen Kollar-Kotelly**
v.	**DECK TYPE: Civil General**
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, **600 5th Street, N.W.** **Washington, D.C. 20001**	**DATE STAMP: 11/10/97**
Defendant.	
SERVE: **Robert L. Polk, Esq.** **General Counsel and** **Registered Agent** **600 5th Street, N.W.** **Washington, D.C.** **20001**	

COMPLAINT

KiSKA Construction Corporation-U.S.A. and Kajima Engineering and Construction, Inc., doing business as KiSKA-Kajima, a Joint Venture ("KiSKA-Kajima"), by their counsel, hereby bring this Complaint against the Washington Metropolitan Area Transit Authority ("WMATA") and allege as follows:

PARTIES

1. Plaintiff KiSKA-Kajima is a joint venture formed on February 1, 1994 by KiSKA Construction Corporation-U.S.A., a construction company incorporated under the laws of Delaware and with its principal place of business in Whitestone, New York, and by Kajima Engineering and Construction, Inc., a construction company incorporated under the laws of California and with its principal place of business in Pasadena, California.

2. Defendant WMATA is an instrumentality and common agency of the District of Columbia and contiguous States pursuant to the WMATA Compact, P.L. No. 89-774 (1966). WMATA was established to provide and maintain a modern rapid transit system for the city of Washington, D.C. and its neighboring communities.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to D.C. Code § 1-2439 and Article 81 of the WMATA Compact, D.C. Code § 1-2431. Additionally, this Court has jurisdiction pursuant to 28 U.S.C. § 1332 as there is complete diversity between the litigants and the amount in controversy exceeds $75,000 in value.

4. Venue is properly situated in this Court pursuant to 28 U.S.C. § 1391 (a) and (b).

FACTUAL BACKGROUND

INTRODUCTION

5. On or about December 6, 1993, WMATA issued an Invitation for Bids ("IFB") to KiSKA-Kajima and other potential bidders for Contract 1E0023 ("the Contract") for an extension of the Washington, D.C. Metroline rapid transit system.

6. The Contract provided for the construction of approximately 3,200 linear feet of twin, single-track earth tunnels, an access shaft, fan shaft, and vent shaft. The Project is known as Section E-2c, or the Greenbelt Route 14th Street Tunnels.

7. The Contract was part of WMATA's $2.1 billion fast-track plan to construct four major metrorail segments at nearly the same time instead of sequentially as had been done in the past.

8. As a result, WMATA planned to complete 13.5 miles of rapid transit routes 5 years early and save a reported $600 million.

9. The IFB was revised by amendments which WMATA issued on December 13, 1993, December 15, 1993, December 29, 1993, January 6, 1994, January 14, 1994, and January 20, 1994.

10. KiSKA-Kajima and the other bidders possessed the Contract documents, as amended, for less than twelve days before they were required to submit their bids.

11. During this period, KiSKA-Kajima and the other bidders were required, among other things, to analyze the Contract plans and specifications, obtain material, equipment and subcontractor quotes, prepare prices for the various work items and submit a fixed price bid to WMATA.

12. Bids were opened on February 2, 1994, and KiSKA-Kajima was deemed the low responsive and responsible bidder for the Contract.

13. On February 25,1994, WMATA awarded the Contract to KiSKA-Kajima for a fixed price of $42,905,000.00.

14. Section 101, Part IX, of the Contract required that all work be completed within 940 days of Notice to Proceed.

15. WMATA issued Notice to Proceed on April 4, 1994. Thus, KiSKA-Kajima was required to complete all Project work by October 30, 1996.

16. The Contract plans and specifications for the Project required, among other things, the installation of a dewatering system designed by WMATA, the installation of a chemical grout program designed by WMATA, and the use of an open face digger shield specified by WMATA to mine the inbound and outbound tunnels.

17. Under the unique terms of the Contract, WMATA assumed the design responsibilities for the dewatering system, the means and methods of tunneling, the tunneling equipment and the chemical grouting plan.

18. This was the first contract in which WMATA assumed design responsibilities for a dewatering system to be utilized in an underground construction project.

19. WMATA warranted that its design and implementation of the dewatering system would result in a dry, stable and workable subsurface environment thus allowing the bidders to base their estimates of construction costs ideal conditions for tunneling.

WMATA'S DESIGN PROCESS

20. Beginning in the 1960's, WMATA engaged geotechnical consultants to conduct subsurface investigations and analyses of the Greenbelt Route section of the Washington, D.C. Metroline Subway System ("Metro").

21. WMATA hired Mueser Rutledge Wentworth & Johnston ("Mueser Rutledge") as its General Soils Consultant to perform field explorations and laboratory tests and report to WMATA its findings and recommendations regarding subsurface materials along the Greenbelt transit route.

22. As early as 1969, Mueser Rutledge prepared geotechnical reports which identified specific subsurface problems associated with the Greenbelt route.

23. In October 1971, Mueser Rutledge submitted to WMATA its Final Report with respect to the subsurface conditions along the Greenbelt route, including the E-2c section which is the subject of this litigation.

24. In 1974, Mueser Rutledge carried out an investigation at the request of WMATA's Section Designer, C.E. Maguire, Inc. ("Maguire"), to evaluate specific problems in mined tunnels, specifically for Section E-2c of the Greenbelt route.

25. From November 24,1992 to March 4, 1993, GZA GeoEnvironmental, Inc. ("GZA"), an experienced geotechnical consulting firm, prepared a series of three Tunnel Alternatives Reports ("TAR") for WMATA's Section Designer, Maguire, on this Project.

26. WMATA requires a TAR on every contract to discuss in detail the subsurface conditions on the Project, extensively analyze alternative tunnel construction methodologies, and direct specific requirements for the tunneling means, tunneling equipment, pre-support chemical grouting, and the tunnel liner, given the subsurface conditions identified.

27. In the IFB, WMATA referenced and made available to the bidders certain subsurface investigation reports for their information and also made these reports part of the Contract pursuant to General Requirements, Section 101.

28. Pursuant to General Requirements, Section 101, of the Contract, the subsurface investigation reports were made

available to the bidders by WMATA "in order that the contractor may have the same information as is available to [WMATA]."

29. Conspicuous in their absence, the three GZA Tunnel Alternatives Reports prepared for WMATA in 1992 and 1993 were neither made available to the bidders nor incorporated in the Contract.

30. Based on its studies, GZA issued unequivocal directives, warnings and recommendations to WMATA with respect to the proper tunneling methods, tunneling equipment, dewatering system and grouting plan to be utilized by the contractor given the expected subsurface conditions.

31. The TARs were based in part upon the subsurface data presented in two reports prepared by Mueser Rutledge.

32. Additionally, in preparing the first TAR, GZA specifically relied upon:

a. several meetings with WMATA's Project design team;

b. a site visit;

c. interviews of key WMATA staff regarding design requirements and previous soft ground tunneling experience in Washington, D.C.;

d. interviews of tunnel contractors experienced with soft ground tunneling in Washington, D.C.;

e. interviews of tunnel lining manufacturers;

f. interviews of soft ground tunnel boring machine equipment manufacturers; and

g. geotechnical engineering evaluations of ground conditions relative to the proposed tunnels and shafts.

33. GZA's second TAR dated January 1993, which contained even more pointed directives, warnings and

recommendations, was based upon all of the foregoing references plus interviews with dewatering contractors experienced in the Washington, D.C. area and interviews with key members of the Los Angeles Metro System.

34. Moreover, GZA's recommendations in its second TAR were predicated upon a careful consideration of the subsurface conditions, the probability of instituting an effective dewatering system, and the methods used for tunnel excavation for the Project.

35. Two months later, in March 1993, a third TAR was submitted by GZA in which its conclusions were significantly revised. Notably, the only additional referenced basis of its opinions in the third TAR was a meeting before WMATA's Board of Engineering Consultants ("BOEC").

36. In its first TAR, GZA directed WMATA to require the Contractor to use a closed face tunnel boring machine to mine the Project because of the anticipated subsurface conditions.

37. GZA also advised WMATA in the first TAR to strictly prohibit the use of open faced tunneling on this Contract.

38. Additionally, from approximately Station 92 to Station 98, which comprises the first 600 feet of the tunnel, GZA recommended that the Contractor be required to use open cut excavation techniques. That is, in the first 600 feet of the tunnel, GZA directed WMATA to excavate the tunnel from the surface, thus prohibiting mining by any method.

39. The specified tunneling methods for this Project were based, in large part, on the inability of the subject subsurface conditions to be effectively dewatered.

40. Specifically, in the first TAR, GZA characterized the subsurface conditions to be encountered by the Contractor as follows:

> Soil and groundwater along the alignment are characterized by one of two distinct geologic units,

> Pleistocene terrace deposits and Cretaceous granular deposits. Although lithologically similar, they vary significantly in terms of in-situ density. Groundwater for most of the alignment is anticipated to be above the crown with the exception of the last few hundred feet where the groundwater will probably be approximately at spring line. Both the Pleistocene terrace deposits and the Cretaceous deposits contain discontinuous, but highly permeable, lenses of gravel and or sand and gravel which have created substantial face stability problems on previous WMATA projects. Effective dewatering of these permeable lenses is difficult. There are no assurances that, even with fairly extensive dewatering, face stability problems can be entirely eliminated. Although dewatering may be feasible to reduce the impact of these permeable lenses, the fact that these lenses are discontinuous may result in significant cost to the project without a major benefit to face stability or rate of tunneling.

41. Based on the potential inability to effectively dewater the ground even with "fairly extensive" dewatering measures and the anticipated "face stability problems", GZA required the use of a closed face tunnel boring machine to excavate the tunnels and recommended that the use of open face tunneling be "strictly prohibited", stating:

> Therefore, some type of closed face tunnel boring machine (TBM) will be required for the project. Although open face tunneling may be possible in the P2 stratum; we recommend that open face tunneling be strictly prohibited on this contract. Obviously, access to the TBM face will be required though should boulders/cobbles be encountered. The use of compressed air is not judged as an

> alternative tunneling technique due primarily to the limited cover available at the beginning of the alignment and cost considerations.

42. With respect to the first 600 feet of the tunnel (Stations 92-98), GZA directed WMATA to prohibit mining by any method.

43. In that section of the alignment, GZA recommended open cut construction as a result of the anticipated subsurface conditions:

> The major tunnel construction challenges of the project are from Station 92-98 where a combination of, limited cover, a curved alignment extending from the shaft to 14th Street, and permeable strata within the tunnel face, will lead to difficult tunneling conditions. Due to these factors we recommend that a work shaft be constructed at V Street to aid in the general dewatering of the area. Furthermore, we recommend that as much of the outbound tunnel be constructed using open cut techniques.

44. In its second TAR dated January 1993, GZA recommended that WMATA specify an Earth Pressure Balance ("EPB") machine, a particular type of closed face tunnel boring machine, to excavate the tunnels based upon the substantial risk that the ground could not be dewatered which would present face stability problems and unsafe working conditions.

45. In addition to recommending an EPB machine as the particular type of closed face tunnel boring machine to be used, GZA mandated that no option for open face tunneling should be allowed by WMATA:

> The variable soil conditions at the tunnel face in conjunction with groundwater conditions above the tunnel crown for most of the alignment dictate the use of closed face tunneling machines.

46. As of January 1993, WMATA knew that the closed face tunnel boring technique was the only appropriate mining technique which could be used given the variable soil and groundwater conditions present at the site and the sound engineering advice of its consultants.

47. In the second TAR, GZA also advised WMATA that the excavation rate using an EPB was twice as slow as open face excavation methods.

48. Despite the additional time and corresponding extra costs associated with the closed face tunnel boring machine, GZA maintained its position that open faced mining be prohibited:

> Although EPB tunneling is considerably slower than open face excavation methods, by about a factor of two, as discussed above, dewatering considerations dictate closed face mining methods.

49. In comparing the viability of alternative liner systems for the project, GZA again analyzed the advance rates (and corresponding time and costs) associated with closed face EPB machines versus open faced machines, concluding as follows:

> Temporary liners used with cast-in-place methods are most appropriate where an open faced TBM is used in conjunction with a dewatering system or under compressed air. The erection time of liners becomes less important with closed face EPB machines as the advance rates are a factor of two less than open faced machines. We do not believe the majority of the soils along this alignment can be effectively dewatered; thus, precluding consideration of open face mining methods. Dewatering, if attempted, would, in our opinion, be costly and probably ineffective. In consideration of these two factors, the risk associated with tunneling in a highly urban environment using an open faced

> tunneling method with ungasketed liners is judged excessive.

50. As the economics of a two pass liner system are predicated upon using an open face shield, GZA concluded:

> Although not a direct requirement, the economics of the system [two pass liner system] requires relatively high production rates during tunneling. Therefore, open faced machines are typically part of that system. Open faced tunneling in conjunction with dewatering is not judged a viable construction technique on this Contract.

51. On March 4, 1993, GZA issued its third and final TAR.

52. The third TAR was not based on any additional information received after the submission of the first two TARs, but was submitted after a meeting was held with WMATA's Board of Engineering Consultants.

53. In its third TAR, GZA reversed its position that "open faced tunneling in conjunction with dewatering [was] not judged a viable construction technique on the Contract" and that open face tunneling was "strictly prohibited".

54. Instead, GZA stated:

> We believe that the tunnels can be successfully constructed with either a closed face tunnel boring machine (TBM) in combination with a gasketed lining system and limited dewatering; or an open faced shield in combination with a primary liner and cast-in-place concrete final liner. Extensive dewatering will be an essential element of the open faced shield option. Provisions for removal of boulders from in front of the TBM would be an essential requirement of the closed face approach.

* * *

> The tunnels can be successfully constructed using an open faced shield, however, because of concern about the difficulties of effectively dewatering the terrace and cretaceous sands, we recommend that the Contractor be required to improve and presupport the ground through extensive grouting and systematic dewatering for the entire Contract. These provisions are especially critical to the first 400 feet of the Contract from Sta. 96 to Sta. 100.

55. Accordingly, after its meeting with WMATA's Board of Engineering Consultants, GZA now recommended open face mining as a viable tunneling option. GZA, however, stated that open faced mining was an alternative to closed face tunneling only if performed in conjunction with "extensive dewatering" and "extensive grouting".

56. Despite acquiescing in WMATA's desire to allow open face mining as a tunneling option on the Project, GZA maintained that such a tunneling method was wholly predicated upon the ability to effectively dewater the ground, an accomplishment which was previously deemed not possible for the majority of the soils along this alignment.

57. In addition to making open faced tunneling entirely dependent upon effective dewatering, GZA still reiterated its reservations as to whether this was even possible, warning WMATA as follows:

> Where groundwater control is not a major issue, open face tunnel shields are very effective permitting adequate ground support combined with rapid excavation rates. Through our research of past experience on the WMATA system and analyses of the subsurface conditions for this alignment, we judge that effective dewatering of the alignment is at best going to be difficult. Therefore, in order to reduce the potential for

> ground loss and resulting surface settlement, as a result of seepage into the tunnel either through the liner or at the shield face, we believe that an extensive pre-support grouting/ground improvement program should be required for most of the alignment.

58. Although allowing open face tunneling as an alternative mining method, GZA told WMATA that it was contingent upon effective dewatering of the alignment which "at best" was going to be difficult.

59. With respect to approximately the first 600 feet of the tunnel, from Station 92 to Station 98, GZA confirmed its recommendation that no mining be allowed due to the unfavorable subsurface conditions.

60. After issuance of the final TAR, GZA detailed for WMATA's Section Designer the scope of the dewatering which was necessary in order to allow open face tunneling methods to be used.

61. On May 3, 1993, after reviewing GZA's final TAR, WMATA provided written comments to GZA.

62. On May 25, 1993, in response to WMATA's comments regarding GZA's recommendations, GZA stated:

> Regardless of the pre-support grouting, in our opinion dewatering must be performed on this contract. Our concerns for grouting are to limit the development of chimneys to the ground surface not only in the beginning of the alignment where we have limited soil cover, but also in the non-cohesive P2 deposits up-station. The grouted arch will not assist in limiting loss of ground beyond the arch if groundwater is not depressed the recommended two feet below tunnel invert

63. As of May 1993, WMATA knew that the pre-support grouting would not be effective unless the groundwater table was lowered two feet below the invert or floor of the tunnel.

64. Additionally, six months before issuance of the IFB, WMATA recognized that open face mining could only be used if the groundwater level was effectively maintained two feet below the invert of the tunnel.

65. Thereafter, GZA was asked by WMATA's Section Designer to perform a quality control ("QC") review and commentary of the draft Contract plans and specifications as they relate to the geotechnical aspects of the Project.

66. With respect to draft Specification Section 205, *Dewatering*, GZA stated that it was imperative to open faced tunneling that the groundwater be lowered two feet below the invert of the tunnel and that the Contractor be required to use "whatever means necessary" to achieve this objective:

> The dewatering specification must contain stronger language as this is a key component to the success of open face tunneling. Specifically, language such as "the contractor shall use whatever means necessary to dewater the alignment to 2 feet below tunnel invert; including but not limited to, deep wells, shallow wells, ejector wells and well points", is a minimum. Reference should also be given to the geotechnical report where our concerns with regard to dewatering are amplified.

67. Thus, GZA not only defined the necessary extent of the dewatering effort for WMATA's Section Designer (i.e., groundwater must be lowered 2 feet below the tunnel invert), GZA also advised WMATA that, at a minimum, the Contractor should be charged with the responsibility to use "whatever means necessary" in order to achieve this requirement.

WMATA'S MATERIAL MISREPRESENTATIONS AND CONCEALMENTS

WMATA's Misrepresentations With Respect to Prescribed Tunneling Methods

68. In contravention of the express directives, warnings and recommendations of its geotechnical consultants, WMATA contractually dictated that the Contractor use open face tunneling methods to mine the tunnels prohibited use of a closed face tunnel boring machine (including an EPB) and, except for a small and necessary access shaft, prohibited using open cut techniques in the first 600 feet of the alignment.

69. Ignoring its geotechnical design team, WMATA mandated open faced tunneling techniques without allowing the contractor the opportunity to devise and implement its own dewatering plan to lower the groundwater the required 2 feet below the tunnel invert or informing the bidders of GZA's explicit concerns regarding whether the alignment could even be dewatered to this necessary level.

70. WMATA's first misrepresentation regarding tunneling methods which was in direct contravention of its geotechnical engineers' recommendations was to dictate excavation of the tunnels using the open face mining method.

71. WMATA not only prescribed the use of an open face digger shield to excavate the tunnels, it expressly prohibited the use of a closed face tunnel boring machine.

72. Under the express terms of the Contract, WMATA eliminated any option to use closed face tunneling and failed to explain in the Contract, except for a single sentence alluding to the presence of unidentified boulders, why closed face tunneling techniques were not considered appropriate.

73. Contrary to the sole reason WMATA gave for excluding the closed face tunneling option, GZA maintained, even in its

final TAR, that boulders would not inhibit the use of a closed face TBM:

> We believe that the tunnels can be successfully constructed with either a closed face tunnel boring machine (TBM) in combination with a gasketed lining system and limited dewatering; or an open faced shield in combination with a primary liner and cast-in-place concrete final liner. Extensive dewatering will be an essential element of the open faced shield option. Provision for removal of boulders from in front of the TBM would be an essential requirement of the closed face approach.

74. In fact, the potential risk of encountering boulders with a closed face EPB was considered and dismissed in GZA's January 14, 1993 TAR. In that GZA report, the closed face EPB tunneling machine was not only considered an option but was deemed a requirement despite the potential presence of boulders.

75. Contrary to the affirmative representations in the Contract, WMATA knew that state of-the-art EPBs were more than capable of either machine mining boulders or providing access to the heading to allow for the removal of boulders should they be encountered.

76. Indeed, WMATA prepared a report in February 1992 in which it concluded that the advantages of a one-pass system (as evidenced by five closed face TBM contracts) outweighed the advantages of a two-pass liner (as evidence by several open face shield contracts) in the same type of sands and clays as present in this Contract.

77. With respect to the first 60 feet of the tunnel, WMATA once again ignored GZA's recommendations and failed to disclose material facts to the bidders.

78. Contrary to GZA's recommendation that the first 600 feet of the tunnel alignment from Station 92 to Station 98 be

excavated by the open cut method (i.e., without mining), WMATA again dictated the use of open face mining.

79. WMATA gave no explanation as to why this admittedly troublesome area could not be excavated by open cut techniques rather than mined with an open face digger shield as required under the Contract.

WMATA's Misrepresentations With Respect to the Prescribed Dewatering System

80. WMATA also knowingly misrepresented the facts with respect to the design of the dewatering system.

81. In Contract Subsection 205.1.2.B to Section 205, *Dewatering*, WMATA provided:

* * *

> 2. For mined earth tunnels, a minimum dewatering system is shown on the Drawings. The various procedures for control of groundwater shall be performed under the supervision of specialist with experience in responsible control of work similar to that proposed for control of groundwater for the project and who have successfully directed such work on similar projects.
>
> 3. For mined earth tunnels, additional wells beyond the specified minimum dewatering system may be required to effectively reduce hydrostatic pressure and control groundwater in soil surrounding each tunnel in order to prevent the following:
>
> a. Heaving of the invert, blowups, hazardous seepage and sudden flow of soil in tunnel face.
>
> b. Loss of ground and surface subsidence.
>
> c. Maintain groundwater 2 feet below invert.

82. Based upon the foregoing specifications, WMATA contractually promised the bidders that if WMATA's minimum dewatering system was not entirely successful in effectively reducing hydrostatic pressure and controlling groundwater in the soils surrounding each tunnel, WMATA would require additional wells to "prevent" heaving of the invert, blowups, hazardous seepage, flow of soil in the face, loss of ground and surface subsidence and to "maintain" groundwater two (2) feet below the invert.

83. WMATA's design of the minimum dewatering system was issued to the bidders in Amendment No. 1, on December 13, 1993, or approximately one week into the bidding process.

84. The dewatering system dictated by WMATA depicted 61 dewatering wells spaced approximately 100 feet apart along the alignment.

85. Because WMATA was contractually responsible for directing the installation of additional wells "to effectively reduce hydrostatic pressure and control groundwater" in order to, among other things, "maintain groundwater 2 feet below the invert", WMATA identified the number and type of potential additional dewatering wells in the Bid Unit Price Schedule.

86. The Bid Schedule defines the potential additional dewatering wells as follows:

Additional Dewatering Wells		
a.	Deep Wells	30 ea.
b.	Shallow Wells	30 ea.
c.	Modification of Control Piezometers to Dewatering Wells	15 ea.

87. WMATA's dewatering system called for 61 widely spaced dewatering wells in its "minimum" system and potentially 60 more wells to be required by WMATA in order to meet the design objectives warranted by WMATA.

88. If WMATA's stated design criteria still were not achieved, WMATA was obligated to direct the modification of 15 control piezometers to dewatering wells.

89. In all, WMATA's dewatering system design consisted of a maximum of 121 dewatering wells and the conversion of 15 piezometers to dewatering wells.

90. With respect to the design of the dewatering system, WMATA concealed the fact that in 1993, GZA designed and submitted to WMATA a dewatering system for this Project which depicted approximately 225 dewatering wells.

91. Upon information and belief, WMATA directed GZA to design a dewatering system which would "absolutely" draw down the water table below the tunnel invert.

92. GZA's 225-well dewatering stem design depicted wells very closely spaced along the east and west sides of the tunnel alignment.

93. Consequently, GZA's dewatering system depicted over 300% more dewatering wells than shown in WMATA's minimum dewatering system and approximately 100 more wells than WMATA promised would be directed, if necessary, to meet the stated design requirements.

94. WMATA concealed from KiSKA-Kajima and the other bidders GZA's 225-well dewatering system design and failed to take steps to implement this system during performance of the Contract.

95. In addition to providing KiSKA-Kajima with a dewatering design which WMATA knew was entirely inadequate based upon the express recommendations of its geotechnical consultants, WMATA also failed to follow sound engineering practices and the advice of its consultants in developing the design of the dewatering system.

96. In deciding to become the first owner in the United States to assume the design responsibilities for a dewatering

system on a construction project, WMATA prescribed a minimum design without making the Contractor responsible for any supplementary measures which may have proven necessary to meet the contractually mandated objectives.

97. By doing so, WMATA denied KiSKA-Kajima and the other bidders the opportunity to include in their bids the costs of augmenting the dewatering system during contract performance based upon their own prebid geotechnical analyses should the system fail to meet the performance criteria set forth in the Contract.

98. WMATA also failed to perform a comprehensive program of pumping tests in order to accurately determine the scope and cost of the required dewatering effort.

99. In accordance with the advice of its geotechnical consultants, WMATA realized that a comprehensive program of pumping tests was required to penetrate all zones that would be pumped during dewatering.

100. As WMATA unilaterally decided to assume all responsibility for the dewatering system design, WMATA retained Rummel, Klepper & Kahl Consulting Engineers ("RKK") to perform a pumping test analysis as "support" for its minimum design.

101. RKK was retained to prepare a geohydrologic study regarding the performance and analysis of pumping tests on the Project.

102. However, WMATA only engaged RKK to perform a single pump test in one isolated area along the 3,200 foot alignment composed of extremely variable subsurface conditions.

103. On August 13, 1993, RKK entered into a subcontract with Moretrench American Corporation ("Moretrench") to conduct the test.

104. Pursuant to the pumping test which was completed on October 8, 1993, RKK concluded as follows:

> From the limited soils made available to Moretrench American Corporation, it appears that numerous soil interfaces will occur within the limits of the excavation and immediately below. A predrainage system will only be able to effect (sic) water in the permeable zones and then with limited effect directly above each interface. The magnitude of inflow of this residual is a matter of technique; for instance, an open cut excavation would require sand bagging and ditching on a bench along the interface to prevent movement of soil into the excavation. It would be desirable, in this instance, to use closely spaced dewatering devices in order to minimize the amount of residual water above interfaces. In the case of a slurry trench or a structured slurry wall, a complete cut-off can be anticipated and no dewatering would be required. H-pile, with lagging and sheet piling are two cases in between the extremes. Excavation and dewatering methods must be closely coupled in order to minimize movement of soils into the open excavation. Criteria must be established by the GC and Engineer for water levels outside the excavation relative to subgrade and impermeable interfaces. These water levels must be monitored and the pumping system operated (most likely continuously) to maintain the requirements throughout construction.
>
> Please note the results from this pumping test are applicable only to this area of the alignment. The hydrologic parameters could vary significantly over the entire E-2 portion of the subway construction.

105. As RKK's pumping test did not penetrate all zones that were to be pumped during dewatering, WMATA should not have relied upon the results of the RKK pumping test to design the dewatering system for the Project.

106. In fact, RKK warned WMATA that its analysis was based on "limited soils data" and that "the results from this pump test [were] applicable only to this area of the alignment."

107. Therefore, in addition to disregarding and concealing GZA's dewatering plan, the dewatering system designed by WMATA as based upon limited subsurface data which was not representative of the ground conditions throughout most of the alignment.

WMATA's Misrepresentations With Respect to Chemical Grouting

108. WMATA also knowingly made material misrepresentations and concealed essential information with respect to the quantity, method, and location of the chemical grouting to be placed on the Project.

109. Moreover, WMATA again assumed the responsibilities for this work, thus precluding KiSKA-Kajima and the other bidders from developing their own grouting plans based on their own geotechnical investigations.

110. In its review of the draft Contract plans and specifications, GZA advised WMATA that the Contractor, not WMATA, must have exclusive control over the design and implementation of the grouting plan:

> As with the dewatering specification, both sections 239 and 240 [Chemical Grouting and Compaction Grouting] require stronger language. This is a performance specification, it is up to the Contractor to devise methods that achieve the intent of the Specifications.

111. Notwithstanding GZA's directives to issue a performance and not a design specification, WMATA assumed control over the design of the pre-support grouting plan, just as it did the dewatering plan.

112. In Contract Specification 239, *Pre-Support Grouting*, WMATA stated in paragraph 1.1.B:

> Pre-support chemical grouting shall be performed from the existing ground surface at locations shown on the contract drawings. It is the intention of the surface grouting program to create a continuous arch above the crown of the tunnel from the bulls eye of the tunnel forming a 120 degree arch. The grouted arch should extend at least two tunnel diameters in front of the shield prior to advancing the tunnel.

113. Contract Drawing No. M904-44 depicts vertically installed grout pipes in a diamond grid layout at 5 foot centers. Based upon the pattern and location of the specified grout holes shown on the Contract Drawing, WMATA required the installation of approximately 5,000 grout pipes.

114. At the pre-bid conference, WMATA confirmed that the grout pipes were required to be installed as depicted in the Contract Drawings:

> *Question*:
>
> With reference to the pre-support grout zone, is it the designers intent to install all grout pipes throughout the designated zone? And, if so, at what spacing are the rows to be installed? (Sheet M904-44 Sec. A-A).
>
> *Answer*:
>
> Grout pipes are to be installed in a 5 foot diamond grid laid out in accordance with Section A-A Sheet M904-44 (Refer to Longitudinal Section).

115. In addition to the number and location of grout pipes, WMATA dictated the chemical grouting materials, equipment and procedures, including the grout mixing method, injection procedures and gel times.

116. With respect to the estimate quantity of chemical grout to be placed, WMATA specified 110,000 cubic feet (cf) in the Unit Price Bid Schedule.

117. Ignoring GZA's recommendations to issue a performance specification which made the Contractor responsible for grouting, WMATA dictated the method, location and estimated quantity of grout to be placed.

118. As with the dewatering requirements, however, WMATA misrepresented and concealed material facts which were imperative to an effective grouting plan and the efficient prosecution of the work.

119. WMATA engaged its Section Designer to design a grouting program to be implemented in conjunction with the dewatering system to control groundwater and stabilize the ground.

120. WMATA's Section Designer, at WMATA's direction, prepared a grouting plan to be used in conjunction with its 225-well dewatering system.

121. In their grouting plan, WMATA' consultants estimated that approximately 400,000 cf of chemical grout would be necessary based upon the anticipated subsurface conditions.

122. Like GZA's proposed dewatering system, the grouting plan was submitted to WMATA for consideration and incorporation in drafting the Contract plans and specifications.

123. The recommended grouting program, like the recommended dewatering plan, was disregarded by WMATA and concealed from KiSKA-Kajima and the other bidders.

124. By including only 110,000 cf in the Bid Unit Schedule, WMATA realized that there would be a tremendous chemical

grout quantity overrun during Contract performance. Therefore, WMATA recognized that by deliberately understating the quantities of chemical grout to be placed, the base bids would be substantially lower.

125. WMATA's material misrepresentation also induced a lower unit price for chemical grouting because an accurate representation of quantities would have necessitated additional crews, extra specialty equipment, additional supervisory personnel, overtime and additional shifts.

126. WMATA also concealed from KiSKA-Kajima and the other bidders material facts regarding GZA's proposed method and location of chemical grouting.

127. Contrary to the surface grouting which was dictated by WMATA, GZA recommended that the grouting be performed from the face, stating:

> For the main line tunnels grouting is recommended to be performed from the face of the TBM to the crown of the tunnel. Grouting should be performed to create a continuous arch above the crown of tunnel from bulls eye of tunnel to create a 120 degree arch. The arch should extend at least two tunnel diameters in front of the shield. The minimum recommended thickness of the grouted arch should be 5 feet. Grouting should be performed sequentially during liner erection and prior to shield advance so as to continuously maintain a minimum of two tunnel diameters of pre-support grout in advance of tunneling.

128. WMATA, recognizing that grouting from the face would result in substantially lower tunneling productivity rates and corresponding higher bids, disregarded and concealed GZA's recommendation and specified that grouting be performed from the surface.

Impacts During Contract Performance Resulting From WMATA's Misrepresentations And Concealments

129. KiSKA-Kajima relied to its economic detriment on WMATA's misrepresentations and concealments with respect to the tunneling methodology, tunneling equipment, dewatering system and grouting program in both estimating and performing the Contract.

130. As WMATA assumed control over the design and implementation of the dewatering and grouting plans and specified the equipment to be used, KiSKA-Kajima had no choice but to estimate and, thereafter, perform the Contract as dictated by WMATA.

131. WMATA required the use of the open face digger shield to excavate the tunnels, prohibited the use of a closed face tunnel boring machine, including an EPB, and designed and assumed control over the implementation of a deficient dewatering system and grouting plan.

132. Therefore, KiSKA-Kajima was forced to estimate, plan and perform its work based upon WMATA's requirement that open faced tunneling be utilized throughout the Project and express representations that the subsurface conditions would be ideal for such an operation.

133. KiSKA-Kajima further relied to its detriment on WMATA's express representation that should the dewatering system fail to meet the objectives warranted under the Contract, WMATA, not KiSKA-Kajima, would continue to direct the specified supplemental dewatering wells until these objectives were met.

134. After Contract award, KiSKA-Kajima engaged Moretrench American Corporation ("Moretrench"), an experienced dewatering contractor, as its subcontractor to perform dewatering well installation and maintenance for the Project.

135. The first dewatering well was activated on September 28, 1994, about four and a half months prior to the planned start of tunnel excavation.

136. To maximize the operating time of the dewatering system to achieve the anticipated drawdown effect of the minimum design, KiSKA-Kajima commenced dewatering well operation as early as possible, activating all dewatering wells from the Access Shaft to V Street by January 3, 1995, and all dewatering wells up to Florida Avenue by February 8, 1995.

137. In doing so, KiSKA-Kajima was able to monitor the progress of WMATA's dewatering system design and determine its effect on achieving drawdown from an early stage in the Contract schedule.

138. As early as October 26,1994, KiSKA-Kajima informed WMATA that the dewatering wells located at the Access Shaft were insufficient to effectively lower the water table in that area to the required level.

139. As KiSKA-Kajima continue to install and activate dewatering wells, it became readily apparent from the observation wells at the water level was not being drawn down to the level required to begin tunneling.

140. Based upon the provisions of the Contract which required WMATA to direct the installation of additional wells to lower the groundwater level to 2 feet below the invert, KiSKA-Kajima requested that WMATA direct the installation of additional dewatering wells.

141. KiSKA-Kajima promptly advised WMATA that additional wells would be required to achieve the Contract-specified drawdown of two feet below the invert of the tunnel.

142. KiSKA-Kajima again raised these concerns regarding the WMATA-designed dewatering well system at the Dewatering Meeting held on January 26, 1995.

143. Despite its knowledge that open faced tunneling was predicated upon the maintenance of the groundwater two feet below the tunnel invert and that GZA's proposed dewatering design called for 225 dewatering wells, WMATA failed to direct the installation of additional wells sufficient to lower the groundwater two feet below the tunnel invert.

144. On February 21, 1995, KiSKA-Kajima again notified WMATA that the minimum design dewatering system failed to achieve the necessary drawdown.

145. On February 21, 1995, KiSKA-Kajima asked how and when WMATA would direct the necessary installation of additional wells as required under the Contract and specifically requested the design calculations for the dewatering system.

146. Despite its exclusive knowledge that the dewatering system as designed was deficient and that an effective drawdown below the invert was imperative to open face mining, WMATA took no action and refused to provide KiSKA-Kajima with the requested design calculations.

147. At a subsequent Dewatering Meeting on February 23, 1995, KiSKA-Kajima informed WMATA that the "time to do additional work to install dewatering wells is past critical."

148. WMATA again failed and refused to acknowledge the deficiencies in its system or direct additional wells as required under the Contract.

149. On March 9, 1995, KiSKA Kajima again objected to WMATA's decision not to direct the installation of additional dewatering wells.

150. As of March 1995, WMATA had failed to direct any additional dewatering wells.

151. At a subsequent Dewatering Meeting held on March 21, 1995, WMATA admitted that its dewatering system would not achieve the Contract-required drawdown and stated that additional dewatering wells would not improve the conditions.

152. At a Partnering Meeting held on April 6, 1995, WMATA further acknowledged that the requirement to drawdown groundwater from Florida Avenue South would not be achieved.

153. Despite acknowledging that its dewatering specification would not achieve the contractually-required drawdown, WMATA continued to dictate the use of an open face digger shield to mine the tunnels, resulting in substantial impacts, delay, disruption, safety risks and financial harm to KiSKA-Kajima.

154. Instead of directing KiSKA-Kajima to install as many additional dewatering wells as necessary in order to achieve the contractually warranted drawdown of groundwater to two feet below the invert, WMATA forced KiSKA-Kajima to tunnel in dangerously wet conditions.

155. WMATA's failure to design and thereafter implement a dewatering system which met the contractually warranted requirements resulted in subsurface conditions which WMATA was obligated to prevent.

156. KiSKA-Kajima encountered sudden and substantial inflows of water at the tunnel face, highly unstable soils, heaving of the invert and surface subsidence.

157. Not only was the groundwater level not lowered two feet below the tunnel invert as promised, it remained above the springline for much of the alignment and, at times, above the crown of the tunnel.

158. WMATA's directed tunneling technique was incompatible with this environment, causing KiSKA-Kajima to suffer a dramatic loss of productivity and posing great danger to the tunnel personnel, inspectors, and the public.

159. Despite the fact that KiSKA-Kajima's and WMATA's observations consistently indicated that groundwater remained well above the invert of the tunnels, WMATA refused to direct

KiSKA-Kajima to install a sufficient number of additional dewatering wells in order to achieve the warranted conditions.

160. The excessive water and unstable soils which pervaded the tunnel face severely hampered tunnel excavation.

161. KiSKA-Kajima encountered water inflows in the tunnel as high as 50 gallons per minute, which devastated KiSKA-Kajima's mining progress and rendered its planned schedule and sequence of the work meaningless.

162. KiSKA-Kajima encountered uncontrollable seepage at the tunnel face throughout the alignment, which resulted in KiSKA-Kajima's inability to keep the open face digger shield on course.

163. The excessively wet and unstable soil conditions caused the digger shield to dive off line and grade on numerous occasions, resulting in multiple misalignments of the tunnel beyond the tolerances specified in the Contract.

164. The worst such misalignment occurred within the first 600 feet of the tunnel, where GZA expressly recommended open cut excavation and prohibited mining altogether.

165. As a result, KiSKA-Kajima's progress was suspended and adversely impacted as it took exceptional measures to realign and reorient the tunneling machine to return and keep it on line.

166. Because the excavated material was excessively wet, the digger shield conveyor belt repeatedly got stuck during excavation. The conveyor system, an integral component of the excavation system, is used to transport the excavated material from the heading to the back of the tunneling machine where the muck is ultimately transported by muck cars out of the tunnel.

167. KiSKA-Kajima often had to excavate the tunnels by hand to assist the conveyor systems.

168. KiSKA-Kajima was forced to modify the digger shields in order to mine through the wetter material.

169. On May 17, 1995, WMATA and KiSKA-Kajima held a Tunnel Misalignment Meeting at which KiSKA-Kajima advised WMATA that its dewatering system's failure to achieve the anticipated groundwater drawdown and to control water inflows caused the tunnel misalignments.

170. Thereafter, on May 18, 1995, KiSKA-Kajima requested reimbursement for all additional costs resulting from the tunnel misalignments.

171. WMATA rejected KiSKA-Kajima's contention that the dewatering system's failure to achieve the requisite drawdown caused the tunnel alignment problems, and shifted blame for these misalignment problems to KiSKA-Kajima.

172. At a Dewatering Meeting on June 13, 1995, rather than directing the additional wells as was required under the Contract, WMATA unilaterally determined that directing additional wells was not "economically feasible."

173. On June 23, 1995, instead of accepting responsibility for the failure of its dewatering system to achieve the required drawdown and prevent water seepage and sudden flow of soil in the tunnel face, WMATA notified KiSKA-Kajima that all tunnel realignment costs would be charged to KiSKA-Kajima.

174. Throughout the remainder of tunnel excavation work, KiSKA-Kajima repeatedly apprised WMATA of the unexpected and dangerous inflows and running soils.

175. The majority of the water infiltration took place above the spring line and closer to the crown of the tunnel; however, the impacts pervaded virtually the entire tunnel alignment in every aspect of the work.

176. The excessive water inflows significantly impeded advance rates, caused prolonged suspensions of work, and

rendered the pre-support grouting ineffective, thus creating voids above the tunnel.

177. On October 18, 1995, KiSKA-Kajima notified WMATA of the dramatic impact the water inflows were having on its tunneling operation productivity rates.

178. WMATA ultimately directed the installation of only an additional 25 wells, none of which were operational for 90 days prior to tunneling as prescribed in the Contract and several of which WMATA positioned so that they were destroyed after only a few days of operation by the tunnel excavation.

179. Of the 25 additional wells directed by WMATA, only 3 operated for more than 35 days.

180. Four of the additional wells were in operation for less than 10 days before they were destroyed by the tunnel excavation as a result of their specified location.

181. The 25 additional wells installed pursuant to WMATA's untimely directives were superficial and insignificant considering the excessive water inflows and running soils encountered by KiSKA-Kajima.

WMATA's Additional Improper Acts and Omissions

182. WMATA provided incomplete, erroneous and inaccurate Contract plans and specifications regarding, among other things:

a. Contract-specified tunneling equipment;

b. chemical grout work, including chemical grout work sequencing, grout hole drilling methods and grout quantities;

c. the number, locations, elevations and dimensions of the numerous subsurface utilities;

d. the Project's dewatering system;

e. the bridge deck framing in the Fan Shaft and Vent Shaft;

f. the installation of contact grouting;

g. precast tunnel liner segments; and

h. the installation of the protective mud slab for the tunnel invert.

183. WMATA, during the design phase, failed to coordinate the Project with numerous Washington, D.C. utility companies and local permit agencies.

184. WMATA interfered and failed to cooperate with KiSKA-Kajima in performance of the Project work.

185. Despite repeated requests by KiSKA-Kajima throughout Contract performance for change orders and appropriate time extensions to compensate KiSKA-Kajima for the additional costs and delays to the Project schedule caused by WMATA, WMATA continuously refused to accept responsibility for its numerous acts and omissions.

186. WMATA ordered that KiSKA-Kajima meet the Contract milestones unadjusted for excusable and/or compensable delays.

187. Throughout Contract performance, WMATA expressly and constructively directed KiSKA-Kajima to accelerate its work.

188. KiSKA-Kajima, in response, did accelerate the Project work.

189. KiSKA-Kajima has faithfully performed all requirements of its Contract with WMATA, and all work under the Contract has been accepted by WMATA.

COUNT I

FRAUDULENT MISREPRESENTATION

(Fraudulent Inducement of the Contract)

190. Paragraphs 1 through 189 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

191. WMATA represented to KiSKA-Kajima that open face tunneling could be used to safely and efficiently excavate the tunnels.

192. WMATA represented to KiSKA-Kajima that WMATA was able to and indeed would implement its own dewatering plan to lower the groundwater 2 feet below the tunnel invert.

193. WMATA concealed its geotechnical consultants' directive to use closed face mining techniques to excavate the tunnels.

194. WMATA represented to KiSKA-Kajima that closed face mining could not be used to excavate the tunnels.

195. WMATA represented to KiSKA-Kajima that boulders prohibited the use of a closed face TBM.

196. WMATA concealed that state-of-the-art EPBs were more than capable of either machine mining boulders or providing access to the heading to allow for the removal of boulders should they be encountered.

197. WMATA represented to KiSKA-Kajima that the first 600 feet of the tunnel alignment could be efficiently and safely excavated using open face mining techniques.

198. WMATA concealed from KiSKA-Kajima that WMATA's geotechnical consultants recommended that the first 600 feet of the tunnel be excavated by the open cut method.

199. WMATA concealed from KiSKA-Kajima that the variable soil conditions at the tunnel face in conjunction with the groundwater conditions above the tunnel crown for most of

the alignment dictated the use of closed face tunneling machines.

200. WMATA concealed from KiSKA-Kajima that the majority of the soils along the tunnel alignment could not be effectively dewatered, thus precluding consideration of open face mining methods.

201. WMATA concealed from KiSKA-Kajima that dewatering, in the opinion of WMATA's geotechnical consultants, would be costly and probably ineffective.

202. WMATA concealed from KiSKA-Kajima that the open face mining technique required by WMATA on the Project was wholly predicated upon the ability to effectively dewater the ground 2 feet below the invert of the tunnel.

203. WMATA concealed from KiSKA-Kajima that the pre-support chemical grouting would not assist in limiting loss of ground if the groundwater was not depressed 2 feet below the tunnel invert.

204. WMATA represented to KiSKA-Kajima that its design and implementation of a dewatering system would prevent heaving of the invert, blowups, hazardous seepage, sudden flow of soil in the tunnel face, and loss of ground and surface subsidence, and would maintain groundwater 2 feet below the tunnel invert.

205. WMATA represented to KiSKA-Kajima that if WMATA's minimum dewatering system was not successful in achieving the objectives set forth in Paragraph 204 of this Complaint, WMATA would require the installation of additional wells until these objectives were met.

206. WMATA represented to KiSKA-Kajima that its dewatering system design consisting of a maximum of 121 dewatering wells and the conversion of 15 piezometers to dewatering wells was sufficient to meet the objectives set forth in Paragraph 204 of this Complaint.

207. WMATA concealed from KiSKA-Kajima the fact that its geotechnical consultants designed and submitted to WMATA a dewatering system for this Project which depicted approximately 225 dewatering wells.

208. WMATA concealed from KiSKA-Kajima that WMATA failed to follow sound engineering practices and the advice of its consultants in developing the design of the dewatering system.

209. WMATA concealed from KiSKA-Kajima that WMATA failed to perform a comprehensive pumping test program in designing the dewatering system.

210. WMATA concealed from KiSKA-Kajima that the dewatering system designed by WMATA was based upon limited subsurface data which was not representative of the ground conditions throughout most of the alignment.

211. WMATA represented to KiSKA-Kajima that 110,000 cf of chemical grout was the estimated quantity to adequately grout the tunnel.

212. WMATA concealed from KiSKA-Kajima that WMATA's consultants estimated that approximately 400,000 cf of chemical grout would be necessary based upon the anticipated subsurface conditions.

213. WMATA concealed from KiSKA-Kajima material facts regarding WMATA's geotechnical consultants' proposed method and location of chemical grouting.

214. WMATA represented to KiSKA-Kajima that grouting could be efficiently performed from the surface.

215. WMATA concealed from KiSKA-Kajima that WMATA's geotechnical consultants recommended that the grouting be performed from the face of the tunnel.

216. WMATA concealed from KiSKA-Kajima the existence and/or content of GZA's three TARs, which contain material representations concerning the subsurface conditions, tunneling

alternatives, and recommended construction methodologies for the Project.

217. The representations and concealments identified in Paragraphs 191-216 of this Complaint were material to the Contract.

218. The representations and concealments identified in Paragraphs 191-216 of this Complaint were false, fraudulent and misleading.

219. WMATA knowingly, intentionally, purposefully and deliberately made the representations and concealments identified in Paragraphs 191-216 of this Complaint as an inducement for KiSKA-Kajima to enter into the Contract.

220. WMATA intended that KiSKA-Kajima rely on the representations and concealments identified in Paragraphs 191-216 of this Complaint.

221. KiSKA-Kajima justifiably relied on WMATA's representations and concealments identified in Paragraphs 191-216 of this Complaint in bidding on and agreeing to the terms of the Contract.

222. But for WMATA's misrepresentations and concealments, which WMATA knew or should have known would be relied on by KiSKA-Kajima, KiSKA-Kajima would have declined to enter into the Contract for its stated price and terms.

223. In reliance upon WMATA's misrepresentations and concealments, KiSKA-Kajima was fraudulently induced to enter into the Contract with WMATA for its stated price and terms.

224. KiSKA-Kajima relied to its detriment upon the false representations and concealments of material facts made by WMATA in determining the amount of its bid, in submitting its bid, in entering into the Contract and in performing the Contract.

225. Prior to and at the time of entering into the Contract, KiSKA-Kajima had no knowledge of the falsity of WMATA's representations and concealments.

226. As a direct and proximate result of WMATA's fraudulent inducement of the Contract, KiSKA-Kajima has suffered damages in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA for all of its actual losses, including all costs and expenses associated with the Contract, in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial, plus prejudgment and post-judgment interest, reasonable attorneys' fees, costs, punitive damages, and such other and further relief as the Court deems appropriate.

COUNT II

NEGLIGENT MISREPRESENTATION

227. Paragraphs 1 through 216 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

228. The representations and concealments identified in Paragraphs 191-216 of this Complaint were material to the Contract.

229. The representations and concealments identified in Paragraphs 191-216 of this Complaint were false and misleading.

230. WMATA negligently made the representations and concealments identified in Paragraphs 191-216 of this Complaint.

231. WMATA intended or should have recognized that KiSKA-Kajima would rely on the representations and concealments identified in Paragraphs 191-216 of this Complaint.

232. KiSKA-Kajima justifiably relied on WMATA's representations and concealments identified in Paragraphs 191-216 of this Complaint in bidding on and agreeing to the terms of the Contract.

233. But for WMATA's misrepresentations and concealments, which WMATA knew or should have known would be relied on by KiSKA-Kajima, KiSKA-Kajima would have declined to enter into the Contract for its stated price and terms.

234. KiSKA-Kajima relied to its detriment upon the negligent representations and concealments of material facts made by WMATA in determining the amount of its bid, in submitting its bid, in entering into the Contract and in performing the Contract.

235. Prior to and at the time of entering into the Contract, KiSKA-Kajima had no knowledge of the falsity of WMATA's representations and concealments.

236. As a direct and proximate result of WMATA's negligent misrepresentations and concealments, KiSKA-Kajima has suffered damages in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA for all of its actual losses, including all costs and expenses associated with the Contract in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial, plus prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and such other and further relief as the Court deems appropriate.

COUNT III

UNILATERAL MISTAKE

237. Paragraphs 1 through 189 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

238. Prior to, and at the time of contracting, WMATA expressly and impliedly warranted to KiSKA-Kajima that if KiSKA-Kajima adhered to the information in the IFB and Contract plans and specifications, KiSKA-Kajima would be able to complete the work in an efficient and safe manner, and that such work would be acceptable to WMATA.

239. WMATA's express and implied warranty of the accuracy of the IFB and Contract plans and specifications served as the basis for KiSKA-Kajima's bid and the Contract.

240. At the time of contracting, KiSKA-Kajima was laboring under a material error of fact regarding the accuracy of WMATA's IFB and Contract Plans and specifications.

241. KiSKA-Kajima's error of fact occurred as a direct result of WMATA's misrepresentations and concealments of material information set forth in Paragraphs 191-216 of this Complaint which are incorporated by reference herein.

242. At the time of contracting, WMATA knew or should have known that KiSKA-Kajima was laboring under an error of fact regarding the accuracy of the IFB and the Contract plans and specifications.

243. As a direct result of KiSKA-Kajima's error of material fact regarding the accuracy of the IFB and the Contract plans and specifications, KiSKA-Kajima was mistaken in estimating its performance costs and duration prior to executing the Contract.

244. KiSKA-Kajima's mistake in its estimate of performance costs and duration caused KiSKA-Kajima to agree to a Contract price and duration based upon erroneous information.

245. As a direct result, KiSKA-Kajima suffered damages in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA for all of its actual losses, including all costs and expenses associated with the Contract, in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial, plus prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and such other and further relief as the Court deems appropriate.

COUNT IV

MATERIAL BREACH OF CONTRACT

246. Paragraphs 1 through 189 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

247. By issuing the IFB, WMATA expressly and impliedly warranted that all Contract plans, specifications and other information contained therein were accurate, that the successful bidder would have ready access to the various segments of the worksite, that WMATA would cooperate with the successful bidder so as not to hinder, interfere with, or obstruct the performance of the Contract, and that the successful bidder would be able to schedule and perform the work in such a manner as to most efficiently utilize its resources.

248. WMATA materially breached the Contract, including express and implied warranties, in at least the following ways:

a. WMATA failed to disclose necessary and vital information to KiSKA-Kajima relating to the performance and safety of the work to be performed;

b. The Contract plans and specifications and directed construction methods prepared by WMATA were defective, misleading, incomplete and unfit for their intended purpose;

c. WMATA breached its duty to cooperate with KiSKA-Kajima and not hinder or interfere with KiSKA-Kajima's performance;

d. WMATA failed and refused to grant time extensions for excusable and/or compensable delays encountered by KiSKA-Kajima;

e. WMATA directed that extra work beyond the scope of the Contract be performed and has failed and/or refused to pay for such extra work;

f. WMATA failed and refused to administer the Contract in accordance with its terms and with good faith and fair dealing;

g. WMATA failed to coordinate the Project with the numerous Washington, D.C. utility companies and permit-granting agencies;

h. WMATA failed to coordinate the work of its other contractors, including Blake Construction;

i. WMATA failed to obtain necessary permits for construction in a timely manner;

j. WMATA failed and refused to review and approve shop drawings in a timely manner;

k. WMATA failed to provide timely and complete access to the jobsite;

l. WMATA directed the acceleration of the work without compensating KiSKA-Kajima;

m. WMATA arbitrarily and unreasonably directed pervasive changes to the Contract which constituted a cardinal change.

249. As a direct result of WMATA's material breaches of contract, KiSKA-Kajima has suffered damages in the amount of at least $38,000,000.00, the exact amount to be determined and proven at trial.

250. KiSKA-Kajima has performed all conditions precedent to the bringing of this breach of contract action or such conditions have been waived or excused by action of WMATA.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA for all of its damages, including costs, expenses and reasonable profit, in the amount of at least $38,000,000.00, the exact amount to be determined and proven at trial, plus prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and such other and further relief as the Court deems appropriate.

COUNT V

WORK OUTSIDE THE SCOPE OF THE CONTRACT - QUANTUM MERUIT

251. Paragraphs 1 through 250 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

252. As a result of WMATA's acts and omissions described in Paragraphs 1-250 of this Complaint, WMATA caused KiSKA-Kajima to perform substantial work outside the scope of the Contract.

253. KiSKA-Kajima performed this additional scope of work on the Project, for which additional scope KiSKA-Kajima has not been compensated by WMATA.

254. The additional scope of work was performed by KiSKA-Kajima at the direction of WMATA, has benefited WMATA, and WMATA has not paid for such work.

255. The reasonable value of the work which KiSKA-Kajima performed for WMATA outside the scope of the Contract is at least $38,000,000.00.

256. KiSKA-Kajima is entitled to payment for the scope of work performed in addition to that required by the Contract in an amount in excess of $38,000,000.00, the exact amount to be determined and proven at trial.

257. KiSKA-Kajima has performed all conditions precedent to the bringing of this cause of action or such conditions have been waived or excused by WMATA.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA in the amount of at least $38,000,000.00, *in quantum meruit*, the exact amount to be determined and proven at trial, plus prejudgment and post- interest, reasonable attorneys' fees, costs, and such other and further relief as the Court deems appropriate.

KISKA-KAJIMA HEREBY DEMANDS A TRIAL BY JURY.

Respectfully submitted,

WATT, TIEDER & HOFFAR, L.L.P.

/s/

Robert G. Watt, Esq.
(D.C. Bar No. 188698)
Mark A. Sgarlata, Esq.
(D.C. Bar No. 418557)
Heidi B. Hering, Esq.
7929 Westpark Drive, Suite 400
McLean, Virginia 22102
(703) 749-1000

Counsel for Plaintiff